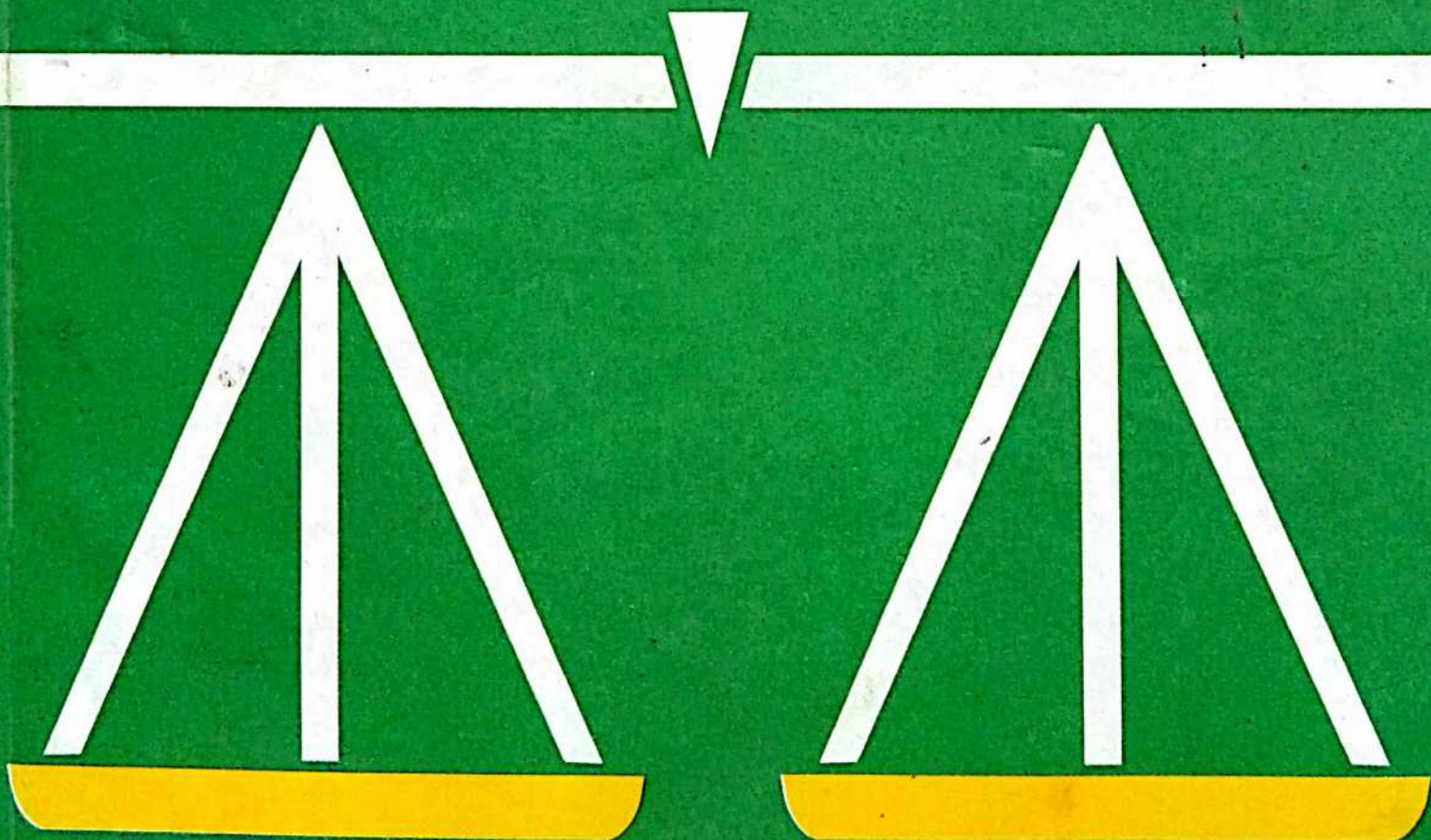


PAKISTAN PENAL CODE

2002



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2 - Katchery Road, Lahore. Tel : 7355418. 7245991

PAKISTAN PENAL CODE

Sharif Ahmad

(XLV OF 1860)

WITH

NEW ISLAMIC LAWS, 1979

By

Shahid Hussain Qadri

*Advocate Supreme Court-High Court
Lecturer Punjab University Law College*

Revised & Brought up-to-date

By

Mian Asad Hakim

Consultant

Mansoor

Book

House-

Katchery Road, Lahore



7245991

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PAKISTAN PENAL CODE 1860

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PAKISTAN PENAL CODE (XLV OF 1860)

[6th October, 1860]

CHAPTER I

INTRODUCTION

Preamble : Whereas it is expedient to provide a general Penal Code for Pakistan: It is enacted as follows:-

1. Title and extent of operation of the Code : This Act shall be called the Pakistan Penal Code, and shall take effect throughout Pakistan.

COMMENTS

Penal Code was drafted by the first Law Commission of which Mr. (afterwards Lord) Macaulay was the President and Macleod, Anderson and Millet were the Commissioners. They drew not only upon English and Indian-Pakistani Laws and Regulations but also upon Livingstone's Louisiana Code and the Code Napoleon. The draft Code was submitted to the Governor-General of India-in-Council in 1837. It underwent further revision at the hands of Sir Barnes Peacock, Sir J.W. Colville and several others, and it was compiled in 1850. It was presented to the Legislative Council in 1856 and was passed on October 6, 1860.

Under the Mughal rule the Islamic Law was used in the administration of criminal justice to the exclusion of Hindu law. The Qur'an was the repository of both civil and criminal law. In interpreting the words of the Qur'an the Kazis (Judges) turned to the decisions of pious Muslim Kings and eminent Muslim jurists of the past. When the Britishers became rulers, they in the first instance introduced English Criminal Law in the Presidency Towns. In the rest of the country Islamic Criminal Law was the Criminal Law of the land.

Pakistan Penal Code has been made applicable and given effect throughout Pakistan. The criminal justice is to be given in accordance with the provisions of this Act keeping in view the provisions of the Code of Criminal Procedure. The Criminal Law has been codified in the Penal Code and the Criminal Procedure Code; the former Code deals specifically with offences and states what matters will afford an excuse or a defence to a charge of any offence, and the Court is not entitled to invoke the common law of England in such matters at all. The Penal Code is the substantive law and the Criminal Procedure Code, the adjective law. Section 5 of the latter Code says: "All offences under the Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained."

According to the case of *Muhammad Bakhsh v. State*, 1995 P Cr. L J 1807 (b), under the Penal Code not constructive but an actual intention is required.

According to the case of *Khurshid Ahmad Baloch Executive Engineer PWD Islamabad Vs. Federation of Pakistan*, 1998 M L D 464. Civil servant's plea that he being civil servant was governed by Civil Servants Act, 1973, and no Court or Authority would have jurisdiction in the matter of terms and conditions of his service in view of provisions of Art. 212 of the

Constitution, was misconceived. Civil servants for their criminal acts would be liable to be proceeded under provisions of Penal Code and other relevant Acts.

Date of Operation of Code : The Penal Code came into operation on the 1st day of January, 1862. Originally it was to take effect on the 1st day of May, 1861, but this date was subsequently changed as it was thought it would not be right to allow the Code, which altered the whole criminal law of the country, to take effect before it was translated and published for the information of the people, and before the Judges and officers had ample time to understand it thoroughly.

Application : Code applies to whole of Pakistan except the areas specially excluded by the Constitution or any other law.

Construction of Sections of the Code : Though quotation from the report of the Indian Law Commissioners may be valuable as a matter of history, it cannot be a legitimate guide for the construction of sections of the Penal Code which must be based on the meaning of the words used, to be gathered according to the ordinary rules of interpretation. It is not necessary and indeed not permissible to construe the Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. The notions relating to this matter have considerably changed between then and now during nearly a century that has elapsed. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible, unless there is anything in the Code or in any particular section to indicate the contrary. **P L D 1958 SC (Ind.) 115.**

2. Punishment of offences committed within Pakistan : Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Pakistan.

COMMENTS

Scope : This section states that every person in Pakistan whether he is a national of Pakistan or otherwise shall be punishable according to the provisions contained therein but not otherwise, that is to say, if the act or omission of a person does not fall within the purview of a particular section, he shall not be punished nor shall he be punished for more than the period of imprisonment, or in any other manner than as provided in that particular section. Thus moral wrongs shall not be punishable however heinous they may be.

Every person : Every person is made liable to punishment, without distinction of nation, rank, caste or creed, provided the offence with which he is charged has been committed in some parts of Pakistan.

The use of the phrase 'every person' in this section as contrasted with the use of 'any person' in Sections 3 and 4 (2) is indicative of the idea that to the extent that the guilt for an offence committed within Pakistan can be attributed to a person, every such person, without exception is liable for punishment under the Code. It is implicit in Section 3 of the Code that a foreigner who commits an offence within Pakistan is guilty and can be punished as such without any limitation as to his corporeal presence in Pakistan at the time. **P L D 1958 SC (Ind.) 115.**

Under this section every person is liable to punishment for an act which is an offence under the Penal Code; but the Criminal Courts have no jurisdiction to try certain persons even if they have transgressed the provisions of the Code. Following are the recognized exceptions:--

Under several statutes public servants are protected against prosecution for acts done in pursuance thereof.

Private individuals not entitled to inflict punishment on supposed offender :

According to the case of *Muhammad Zaman v. Crown*, P L D 1951 Pesh. 6, a number of people proceeded to punish a man and a woman supposed to be keeping a brothel and otherwise leading an immoral life, by blackening their faces and parading them in a procession in streets with their hands tied, the man being completely stripped of clothing and the woman deprived of her *dopatta*. It was held that :

Under no law muchless the Islamic Law a person has got a right to inflict punishment on a person supposed to have committed any offence of moral wrong. Even if they were leading an immoral life, nobody had a right to inflict any punishment on them muchless the punishment of stripping them of their clothes and blackening their faces. Under the law of the land as well as under the Islamic Law general disrepute would not entitle anybody to punish the persons complained against. That those who took the law into their own hands were led to do so by the instigation of religious leaders was no reasons for dealing leniently with them. The offence warranted deterrent punishment.

Similarly the liability to and infliction of punishment is to be determined according to the provisions of this Code or any other law but not otherwise. Private persons are not, therefore, authorised to inflict punishment on an offender according to their own choice or liking.

According to case of *Fateh Khan v. Government of Pakistan*, P L D 1950 Pesh. 39, where some people who were definitely more than five in number, formed an unlawful assembly, the common object of which was to commit mischief or criminal trespass, or other offence by entering into hotels and restaurants after arming themselves with sticks and thus having made preparation for causing hurt to the persons who were not observing facts and where the defence pleaded Hadees in justification of the accused's action. It was held that:

The conviction of the accused under Section 452 of the Pakistan Penal Code was well founded. Nowhere in the Holy Qur'an has anybody been permitted to take law into his own hands and start first judging a person whether he has done a certain wrong or not, and then inflicting the sentence at once. No one in Islamic society has got a right to take the law into his own hands, because if everybody is permitted to become himself the Judge and then inflict the sentence at the spot, there would be chaos in society.

Foreign Sovereigns : The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.....One sovereign being in no respect amenable to another and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. The real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity--that is to say, with his absolute independence of every superior authority.

Protection of President and Governors : No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor in any Court during his term of office. No process for the arrest or imprisonment of the President, or the Governor shall issue from any Court during his term of office.

Ambassadors : The immunity of an ambassador from the jurisdiction of the Courts of the country to which he is accredited is based upon his being the representative of the

independent sovereign or state which sends him, and which sends him upon the faith of his being admitted to be clothed with the same independence of and superiority to all adverse jurisdiction as the sovereign authority whom he represents would be. "He does not own even a temporary allegiance to the sovereign to whom he is accredited, and he has at least as great privileges from suits as the sovereign whom he represents. He is not supposed even to live within the territory of the sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country." If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master, who is bound either to do justice upon him, or avow himself the accomplice of his crimes. But there is great dispute among the writers on the Laws of Nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder. For a direct attempt against the life of the sovereign, an ambassador or one of his suite would directly be punishable by the State.

Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction. The privilege is the privilege of the sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the sovereign or of the official superior of the agent.

Alien enemies: In respect of acts of war, alien enemies cannot be tried by Criminal Courts. Aliens, "who in a hostile manner invade the kingdom, whether their Kings were at war or peace with ours, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but shall be dealt with by Martial Law." If an alien enemy commits a crime unconnected with war, e.g., theft, he would be triable by ordinary Criminal Courts.

And not otherwise : This phrase means that a person can be punished under this Code only and not under former laws. However punishment under special laws is not barred as special law over-rides the general law and Section 5 also provides for it.

Within Pakistan : The expression within Pakistan ordinarily implies that the offence would not be punishable if committed outside Pakistan but a careful perusal of sub-section (1) of Section 4 recently amended provides that any citizen of Pakistan or any person in the service of Pakistan can be punished, may he be within Pakistan or beyond Pakistan.

3. Punishment of offences committed beyond, but which by law may be tried within Pakistan : Any person liable, by any Pakistani Law, to be tried for an offence committed beyond Pakistan shall be dealt with according to the provision of this Code for any act committed beyond Pakistan in the same manner as if such act had been committed within Pakistan.

COMMENTS

Scope : This section only applies to the case of a person who, at the time of committing the offence charged, was amenable to Pakistani Courts. This and the following section relate to the extra-territorial operation of the Code.

By any law : Before any person can be tried in Pakistan for an offence committed beyond Pakistan there must be in existence a law making him liable. **A I R 1938 Nag. 235.** A citizen of Pakistan should be deemed to have committed the offence in Pakistan even it was committed at a place outside Pakistan and that too may not be constituting an offence at that place. **A I R 1964 Bom. 264.** It is also implicit that a foreigner committing an offence within Pakistan is guilty and can be punished as such, even without any limitation as to his corporeal presence in Pakistan at the time. **A I R 1957 S C 587.**

Section 3 of the Penal Code indicates that it is implicit in it that a foreigner who commits an offence within Pakistan is guilty and can be punished as such without any limitation as to his corporeally presence in Pakistan at the time. For if it were not so, the legal fiction implicit in the phrase "as if such act had been committed within Pakistan" in Section 3 would not have been limited to the supposition that such act had been committed in Pakistan, but would have extended also to a fiction as to his physical presence at the time in Pakistan.

4. Extension of Code of extra-territorial offences : The provisions of this Code apply also to any offence committed by--

¹[(1) any citizen of Pakistan or any person in the service of Pakistan in any place without and beyond Pakistan];

(2)[As amended by A.O., 1949, Sch., has been omitted by A.O., 1961, Art. 2 and Sch. (w.e.f. 23rd March, 1956)];

(3) [Omitted by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981];

(4) any person on any ship or aircraft registered in Pakistan wherever it may be.

Explanation : In this section the word "offence" includes every act committed outside Pakistan which, if committed in Pakistan, would be punishable under this Code.

Illustrations

(a) A a Pakistani subject, commits a murder in Uganda. He can be tried and convicted of murder in any place in Pakistan in which he may be found.

(b) [Omitted by Federal Laws (Revision & Declaration) Ordinance, XXVII of 1981].

²[(c) C, a foreigner who is in the service of Pakistan commits a murder in London. He can be tried and convicted of murder at any place in Pakistan in which he may be found.]

(d) D, a British subject living in Junagadh, instigates E to commit a murder in Lahore. D is guilty of abetting murder.

COMMENTS

Object : This section shows the extent to which the Code applies to offences committed outside Pakistan. It is right and convenient that in the case of a Code like the Penal Code, the extent of its extra-territorial operation should appear on the face of the Code itself.

Crimes committed outside Pakistan : Where an offence is committed beyond the limits of Pakistan but the offender is found within its limits two contingencies arise.

(I) Extradition : Extradition means the surrender of a fugitive offender by one State to another in which the offender is liable to be punished or has been convicted. The Law of Extradition is founded upon the broad principle that it is to the interest of civilized communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity

1. Sub-sec. (1) subs. by Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.

2. Clause (c) subs. by the Federal Laws (Revision & Declaration) Ordinance, XXVII of 1981.

of nations that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice. **1895 Q.B. 108.** The procedure for securing the extradition depends upon the scene of the offence. The scene of the offence committed outside Pakistan may be--

- (1) a Foreign State; or
- (2) some British possession.

(II) Extra-territorial jurisdiction : The Pakistani Courts are empowered to try offences committed out of Pakistan either on (1) Land; or (2) High Seas.

(1) Regarding Land : *Vide* Sections 3 and 4 of the Penal Code, and Section 188 of the Code of Criminal Procedure, Local Courts can take cognizance of offences committed beyond Pakistan.

According to Section 188 of the Code of Criminal Procedure when a British subject domiciled in Pakistan commits an offence at any place without and beyond the limits of Pakistan; when a British subject commits an offence in the territories of an Acceding State or tribal area; or when a Government servant commits an offence in the territories of an Acceding State or tribal area; he may be dealt with in respect of such offence as if it had been committed at any place within Pakistan at which he may be found.

A person brought to a place against his will can be said to be found there. **(1858) 27 L J (M C) 48.** Section 4 gives extra-territorial jurisdiction but, as the Explanation says, the acts committed must amount to an offence under the Code. **(1923) 25 Bom. L R 772; 1 L R 47 Bom. 907.**

(2) Regarding High Seas : This jurisdiction is based on the principle that a ship on the High Seas is a floating island belonging to the State whose flag she is flying. Seas beyond the territorial waters are called 'High Seas' and the jurisdiction of the Court to try offences on the High Seas is known as the Admiralty Jurisdiction.

The jurisdiction extends over Pakistani ships, whether they be anchored or sailing, whether on the High Seas or in rivers below the bridges, where the tide ebbs and flows, and where great ships go. **(1868) L R I C C R 161.**

Piracy : 'Piracy' is robbery by sea. To whatever country the pirate may have belonged, he is justicible everywhere, his detestable occupation has made him the enemy of mankind and he cannot on any ground claim immunity from the Tribunal of his captor. **Phillimore International Law, Vol. I, p. 488 (3rd Edn.).**

Regarding Foreigners : Foreigners are not liable for offences committed outside the jurisdiction of Pakistan.

A foreigner, who has committed an offence outside the country in which he is found, cannot be tried by the Courts of the country where he is found. This is so for the reason that the acts of a foreigner committed by him in the territory beyond the limits of Pakistan do not constitute an offence against the Penal Code.

The respondent was prosecuted under Section 380, 454 and 412 of the Penal Code at Gurgaon in India in 1950 when he had migrated to India from Pakistan. It was alleged that the offences were committed by him in Mailsi (Pakistan) in November, 1947. The East Punjab Government accorded sanction for the prosecution under Section 188 of the Cr.P.C. The respondent raised an objection to the jurisdiction of the Court on the ground that at the time of the alleged occurrence he was a national of Pakistan and consequently the East Punjab Government was not competent to sanction prosecution under Section 188 of the Cr.P.C. read with Section 4 of the Penal Code. The trial Court over-ruled the objection on the finding that the respondent could not have acquired Pakistan nationality by merely staying on there from 15th August till 10th November, 1947. On revision, the High Court quashed the charges and

held that trial to be without jurisdiction on the finding that until the respondent actually left Pakistan and came to India he could not have become a citizen of India. *Held* : Two constituent elements necessary for existence of domicile are : (1) residence of a particular kind, and (2) an intention of a particular kind. There must be the factum and there must be the *animus*. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up. In order to make the rule that nobody can be without a domicile effective the law assigns a domicile of origin to every person at his birth. This prevails until a new domicile has been acquired so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country. Respondent's domicile of origin was in Pakistan and he had to be assigned Pakistani domicile till the time he expressed his unequivocal intention of giving up that domicile. Even if the *animus* could be ascribed to the respondent the factum of residence was wanting and in the absence of that fact the respondent had Pakistani domicile and Indian domicile could not be ascribed to him. The question of nationality was not relevant in a case covered by Section 4 of the Penal Code and Section 188 of the Cr.P.C. in these circumstances. The real question to be determined was, whether the respondent had Indian domicile at the time of the commission of the offence and since he did not have Indian domicile the Provincial Government had no jurisdiction to accord sanction under Section 188 of the Cr.P.C. and the Court had no jurisdiction to try the respondent. **P L D 1966 S C (Ind.) 81.**

Acts done within Pakistan as well as foreign territory : A person who is a citizen of Pakistan is liable to be tried by the Courts of this country for acts done by him, partly within and partly without the Pakistan territories, provided the acts amount together to an offence under the Code. **(1865) 2 W R (Cr.) 60.**

³**[5. Certain laws not to be affected by this Act :** Nothing in this Act is intended to repeal, vary, suspend or affect any of the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the State or of any special or local law].

COMMENTS

Scope : This section saves the operation of certain laws which would otherwise appear to have been repealed by the sweeping general provisions of Section 2 taken by itself. Section 2 would appear to repeal all other laws for the punishment of every offence which is made punishable by this Code. The effect of Section 5 is to qualify the general repeal prescribed by Section 2. The two sections taken together declare that offences defined by special and local laws continue to be punishable as before. Though the Code was intended to be a general one it was not thought desirable to make it exhaustive and therefore the offences defined by local or special laws were left out of the Code and merely declared to be punishable as heretofore.

The principle is that where a new offence is created and the particular manner in which proceedings should be taken is laid down then proceedings cannot be taken in any other way. **31 Bom. L R 1151.** However, a person cannot be punished under both the Penal Code and a special law, for the same offence, **5 N W P 49**, and ordinarily the sentence should be under the special Act. **11 C W N 100.** It is confined to cases where the offences are coincident or practically so. **1 L R 53 All 642.**

Punishment for Contempt : The power of the High Court to commit for any contempt of itself is inherent in the Court and arises from the fact that it is a Court of Record. **(1973) 1**

3. Sec. 5 subs. by the Federal Laws (Revision & Declaration) Ordinance, XXVII of 1981.

Cal. 345. This power has not been taken away or in anywise limited by the Contempt of Court Act. **A I R 1944 Bom. 127.**

The Lahore High Court has held that the Criminal Procedure Code does not apply to summary proceedings for punishing contempt. No application for adjournment under Section 344. Criminal Procedure Code, will be entertained because immediate action is necessary to vindicate the authority of the Court. **A I R 1942 Lah. 411 (F.B.).**

Article 204 of the Constitution of Islamic Republic of Pakistan, 1973 provides:

- (1) The Supreme Court or a High Court has power to punish any person who--
 - (a) abuses, interferes with or obstructs the process of the Court in any way or disobeys order of Court; or
 - (b) scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge in relation of his office into hatred, ridicule or contempt; or
 - (c) does anything which tends to prejudice the determination of a matter pending before the Court, or
 - (d) does any other thing which, by law, constitutes contempt of the Court.

Similarly the High Court has power to deal with contempts summarily instead of acting under Section 476 or 480 of the Code of Criminal Procedure or Order XVI, rule 17 of the Code of Civil Procedure.

A Police official passed the contemptuous remarks against the Court on hearing confirmation order in a bail matter. The petitioner first admitted to have made such remarks but later on at the start of contempt proceedings tendered apology while the Court declined to accept and proceeded to convict the petitioner. The contention that punishing Court being itself subject of contempt, it was not competent for it to proceed for contempt by itself. The contention was held devoid of force and the accused was held guilty of contempt. **1981 P Cr. L J 1016.**

CHAPTER II

GENERAL EXPLANATIONS

This Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used as here defined and explained and the meanings thus announced are steadily adhered to throughout the subsequent chapters. Sir James Stephen suggests that the object of this Chapter is to prevent captious Judges from wilfully understanding the Code and cunning criminals from evading its provisions. It does not provide explanations for all cases indiscriminately, but only for those cases where difficulty may arise, when it will be necessary to refer to this Chapter to see what the meaning of the Code is.

6. Definitions in the Code to be understood subject to exception : Throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled "General Exceptions," though those exceptions are not repeated in such definition, penal provision or illustration.

Illustrations

- (a) The section in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offence; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.
- (b) A, a police officer, without warrant, apprehends Z who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z, and, therefore, the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it."

COMMENTS

Scope : This section states that the definitions given in the Code and all provisions and illustrations should be understood not by themselves but subject to exceptions contained in Chapter IV, Sections 76 to 106. As explained in illustration 1 that a child under seven years of age cannot commit an offence but it has been made to presume that a child under seven years of age is not to be proceeded against under the Code.

7. Sense of expression once explained : Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation.

COMMENTS

The maxim *inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another) or *expressio unius est exclusio alterius* (the mention of one is the exclusion of another) is the basis of this section. "To say that it shall have a particular meaning everywhere, is to say that it shall have no other meaning anywhere if the words taken grammatically have a definite, certain and unequivocal meaning, if they constitute a perfectly complete expression susceptible grammatically of that one unequivocal meaning and of that only then, however, absurd and pernicious the consequences, that meaning is to be followed. If, however, the expression does not include the complete thought of the Legislature, or if the words are equally susceptible of several meanings, we are to seek in other parts of the same statute, or in other statutes, certainly in those in *pari materia* with this, the one of the several possible meanings which ought to be put upon the words." I.L.R. 44 Cal. 477 (F.B.).

It is an ordinary canon of construction that a word which occurs more than once in the same Act must be given the same meaning throughout the Act, unless some definition in the Act or the context shows that the Legislature used the word in different senses. **A I R 1931 Nag. 177.**

8. Gender : The pronoun "he" and its derivatives are used of any person, whether male or female.

9. Number : Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

10. "Man"; "Woman" : The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age.

COMMENTS

The word 'man' in a scientific treatise on zoology or fossil organic remains, would include men, women and children, as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense in philosophical or religious disquisitions. But, in almost every other connection, the word 'man' is used in contradistinction to 'woman'. This restricted sense is its ordinary and popular sense. **1868 L R 4 C P 874.**

Speaking generally, the term 'man' is used in the Code in its generic sense meaning a human being.

'Of any age' : These words indicate that a male or female child will come within the word 'man' or 'woman', respectively. Thus a girl of six years of age is held to be women within the meaning of the Code. **(1912) 14 Bom. LR 261.**

11. "Person" : The word "person" includes any Company or Association, or body of persons, whether incorporated or not.

COMMENTS

Person : The word 'person' includes both a natural person (a human being), whether a man, woman or child and an artificial person (a corporation). **(1880) 5 App. Cas. 857.** Its definition is not exhaustive and must be taken to include artificial or judicial persons as well. An idol is a juridical person capable of owning property and therefore a 'person' as defined in the Code. **A I R 1944 Mad. 77.** It is, however, used frequently in the Code in a sense in which it is clear from the context that corporate bodies, etc., are not included.

The word "person" as defined in Section 11 and as appearing in sections describing offences where imprisonment is mandatory, does not include corporate body. Corporate body or company is not indictable for offences which can be committed only by human individuals or for offences punishable with imprisonment. The Officer or Agent authorised to act on behalf of corporate body is individually liable for criminal action. **1977 P Cr. L J 537.**

12. "Public" : The word "Public" includes any class of the public or any community.

COMMENTS

Public : Popularly speaking the word "public" means the general body of mankind or of a Nation, State, or Community. Sometimes it is used in a more restricted sense of denoting only a particular body or aggregation of people. This section states that a class of public or community is included within the term "public". Thus a class, community or section of the people such as the people who follow a particular religious belief or who reside in a particular locality may come within the term "public". It does not necessarily mean all human beings.

13. Definition of "Queen" : *[Omitted by A. O., 1961, Art. 2 and Sched. (w.e.f. the 23rd March, 1965)].*

14. "Servant of the State" : The words "servant of the State" denote all officers or servants continued, appointed or employed in Pakistan, by or under the authority of the Federal Government or any Provincial Government.

15. Definition of British-India : *[Rep. by A.O., 1937].*

16. Definition of "Government of India" : *[Rep. by A.O., 1937].*

17. "Government" : The word "Government" denotes the person or persons authorized by law to administer executive Government in Pakistan, or in any part thereof.

COMMENTS

According to this definition 'Government' includes both the Federal and Provincial Governments. A Collector acting in the management of a Khas Mehal, the property of Government, is as much the Government within the meaning of this section as when he is exercising any of the other duties of his official position.

High Court is part of "Government". **P L D 1961 S C 237.**

18. Definition of Presidency : *[Rep. by A.O., 1937].*

19. "Judge" : The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person,--

Who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or

Who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

Illustrations

- (a) *[Omitted by the Federal Laws (Revision & Declaration) Ordinance, XXVII of 1981].*
- (b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge.
- (c) *[Rep. by the Federal Laws (Revision and Declaration) Act, 1951 (XXVI of 1951), Section 3 and 11, Schedule].*
- (d) *[Omitted by the Federal Laws (Revision & Declaration) Ordinance, XXVII of 1981].*

COMMENTS

Judge : Every person officially designated a Judge is a Judge, e.g., High Court Judge, District Judge, Assistant Judge and Subordinate Judge.

A Judge as contemplated by the Penal Code denotes not only every person who is officially designated as a Judge but also every person who is empowered by law to give in any judicial proceeding, civil or criminal, a definitive judgment, i.e., a judgment which is final.

The illustrations show that a person other than one who is officially designated a Judge and who is empowered to give a definitive judgment, is a Judge only when he is exercising jurisdiction in a suit or in a proceeding. So far as that suit or proceeding -- revenue, civil or criminal -- is concerned he is a Judge but he is not a Judge when he has not the seisin of the case in which he can give a definitive judgment. This is obvious from the last words of the

section under which a body of persons may come under the definition of "Judge" when it is empowered by law to give a judgment, such as arbitrators. (1925) 5 Pat. 110, 115.

Magistrate : A Magistrate is a "Judge" within the meaning of this section, read with Section 4 (2), Code of Criminal Procedure, only when he is exercising jurisdiction in a suit or in a proceeding. Therefore, an affidavit sworn before a Magistrate cannot be used in the High Court. (1925) 5 Pat. 110.

Arbitrator : Arbitrators empowered by law to give a definitive judgment are included in the term 'Judge'. **First Rep., S. 76.** They can come within the term "Judge" only when dealing with a case on reference to their arbitration. It has, however, been held by the Judicial Commissioner's Court, Peshawar, that an arbitrator is not empowered to give a judgment at all. He makes an award and the Court passes judgment thereon. Hence, an arbitrator is not a Judge within the meaning of this section or Section 21. **A I R 1940 Pesh. 41.**

20. "Court of Justice" : The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

21. "Public servant" : The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:-

First : [Omitted by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981].

Second : Every Commissioned Officer in the Military, Naval or Air Forces of Pakistan while serving under the Federal Government or any Provincial Government;

Third : Every Judge;

Fourth : Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth : Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Sixth : Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh : Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth : Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth : Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute

any revenue-process, or to investigate, or to report, or any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty;

Tenth : Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

Eleventh : Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election.

Illustration

A Municipal Commissioner is a public servant.

Explanation 1 : Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2 : Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

Explanation 3 : The word "election" denotes an election for the purpose of selecting members of any legislative, municipal or other public authority, of whatever character, the method of selection to which is by, or under, any law prescribed as by election.

COMMENTS

Public Servant : Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant and performs those duties, and accepts those responsibilities and is recognized as filling the position of a public servant, must be regarded as one, and it does not lie in his mouth to pay subsequently that, notwithstanding his performance of public duties and the recognition by others of such performances, he is not a "public servant." **I L R 8 All. 201.**

The general test to determine whether a person is an officer within the meaning of Section 21 (9), Penal Code is to see whether he is in the service or pay of the Government and whether he is entrusted with performance of any duty. **P L D 1957 S C (Ind.) 190.**

Government Servants and Public Servant : Every public servant within the meaning of this section is not *ipso facto*, a Government servant therefore merely because Secretary, Board of Technical Education is a public servant under Section 28 of Ordinance, 39 of 1962, he cannot be held to be a Government servant. **P L D 1979 Lah. 324.**

Officer : Although the word "officer" as used in the common parlance connotes the holder or incumbent of an office or authority, yet the definition has been interpreted by judicial authorities to include all incumbents of offices high or low irrespective of their status. **P L D 1968 Lah. 424.** Labour Welfare Inspector of Karachi Port Trust in an "Officer". **P L D 1977 Kar. 579.**

Person is an officer of Government if he is in the service or pay of the Government and is entrusted with the performance of any public duty, no matter if such duty is of an exalted character or a very humble one. 1995 PCr.LJ 1572.

Held to be Public Servant : The following have been held to be 'public servants' within the meaning of this section :--

(1) Peons in Government offices. P L D 1955 Lah. 540. (2) Cotton Inspector. P L D 1954 Lah. 37. (3) Employee of Social Welfare Council. P L D 1972 Lah. 196. (4) Head treasurer appointed by contracting treasurer. P L D 1950 Lah. 361. (5) Railway employees. 1975 P Cr. L J 1432. (6) Chief Minister of a Province. A I R 1939 Pesh. 38, and a Minister. P L D 1961 Dacca 753. (7) Officers of Local Boards, Municipalities, District Boards, Sanitary Boards or other such Local Boards. 33 Bom. 38. (8) A Liquidator appointed by the Registrar, Co-operative Societies and a Collecting Agent appointed by such Liquidator. P L D 1977 Lah. 435. (9) Nikah Registrar under the Muslim Family Laws Ordinance. P L D 1969 S C 435. (10) A treasurer who is an employee of the Municipal Committee and receives income of the Municipal Committee is obviously a public servant. P L D 1965 Lah. 369. (11) WAPDA employees performing functions in connection with the affairs of province. 1975 P Cr. L J 1132. (12) Accountant of Agricultural Development Bank. 1968 P Cr. L J 899. (13) Manager Co-operative Bank and Co-operative Society for purpose of Section 21. P L D 1978 Kar. 617.

Not Public Servants : The following persons are held to be not public servants:

(1) Secretary of Central Co-operative Bank is not a public servant; P L D 1957 Dacca 492; (2) Irregular appointment does not affect the status of public servant; P L R 1953 Lah. 1065; (3) A public servant who has retired from office or has otherwise ceased to be so is not a public servant. P L D 1967 S C 23; (4) Union Board member is not a public servant; P L D 1960 Dacca 405; (5) Managing Director of Mill is not a public servant; 20 D L R 786; (6) Chowkidar of Government godown is not a public servant; P L D 1963 Dacca 839; (7) Expression "public servant" does not cover proddars of Treasury; P L D 1963 Dacca 867; (8) Servants employed by Agricultural Development and Supplies Corporation could hardly be regarded as employees of Provincial Government or public servants within the meaning of Section 21 of the Penal Code. P L D 1980 Lah. 579.

Registration of Criminal cases against Civil Servant. According to the case of *Mohammad Bashir V. State*, 1995 PCr.LJ 1572 (a): Person is an officer of Government if he is in the service or pay of the Government and is entrusted with the performance of any public duty, no matter if such duty is of an exalted character or a very humble one.

22. Movable property : The words "movable property" are intended to include corporeal property of every description, except land and thing attached to the earth or permanently fastened to anything which is attached to the earth.

COMMENTS

Definition restricted to material objects : The definition of movable property as given in this section differs from the definitions of that word as given in other enactments. The definition given here excludes all incorporeal objects, such as legal relations and rights which are included in the term in civil law. In other words it takes no account of rights or interest in things apart from the things themselves.

Corporeal Property : Corporeal property is such property as may be perceived by the senses, in contrast with incorporeal rights, which are not so perceivable, as obligations of all kinds. Thus salt produced on a swamp, I L R 4 Mad. 228, papers forming part of the record of a case, 1 Weir 28, and 'Hall ticket' entitling a candidate to sit for an examination as well as 'examination paper' P L D 1957 Lah. 207, are property within the meaning of this section.

Land and thing attached to the earth : This section does not exempt "earth and things attached to the earth", but "land and things attached to the earth"; "land" and "earth" are not synonymous terms, and there is a great distinction between "the earth" and "earth". By severance things that are immovable become movable and it is perfectly correct to call those things attached which can be severed, and undoubtedly it is possible to sever earth from the earth, and attach it again thereto. Earth, that is soil and all the component parts of the soil, inclusive of stones and minerals, when severed from the earth or land to which it was attached, are movable property capable of being the subject of theft. **I L R 15 Bom. 702.** Any part of "the earth" whether it be stones or sand or clay or any other component, when severed from "the earth" is movable property. **I L R 27 Mad. 531.**

Attached to the earth : The Transfer of Property Act defines the expression. According to Section 3 of that Act "attached to the earth" means--

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls of buildings; or
- (c) attached to which is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

23. Wrongful gain : "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful loss" : Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Gaining wrongfully; Losing wrongfully : A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

COMMENTS

Wrongful gain : Two things are essential to constitute wrongful gain or its correlative wrongful loss; by wrongful requisition, retention or deprivation of property and by unlawful means. in other words the property must be lost to the owner, or be wrongfully kept out of it by unlawful means.

Wrongful gain : Two things are essential to constitute wrongful gain its correlative wrongful loss; by wrongful requisition, retention or deprivation of property and by unlawful means, in other words the property must be lost to the owner, or be wrongfully kept out of it by unlawful means.

Wrongful gain; Wrongful loss : The words "gaining wrongfully" or "losing wrongfully" need not be confined only to the acquisition or to the actual deprivation of property, and would cover also cases of wrongful retention of property in the one case and wrongfully being kept out of property in the other. **A I R 1949 All. 619.**

Wrongfully kept out of any property : When a creditor by force or otherwise takes the goods of his debtor out of his possession without his consent or against his will to put a pressure on him to pay his debt, the creditor has caused wrongful loss to the debtor. When the owner is kept out of possession of his property with the object of depriving him of the benefit arising from the possession, even temporarily, the case will come within the definition. **I L R 22 Cal. 1017.**

Gain or loss should be in relation to property : If a person maliciously impounds on the other person's cattle with a view to put him to expense, the latter would be put to pecuniary loss generally, but not of the property in question, and therefore, the person impounding his cattle cannot be proceeded against for theft. **A I R 1943 Oudh 280.**

The words "wrongful loss or damage" only include loss or damage caused by unlawful means. Where the petitioner simply changed the level of the plot belonging to him, there was nothing unlawful in his doing so. He was entitled to deal with his property in any manner he liked unless other party had any right over it. The petitioner was not guilty of an offence under Section 425, P.P.C. **P L D 1952 Azad J & K 13.**

24. "Dishonestly" : Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

COMMENTS

Dishonestly : The word is used here in a technical sense which is at variance with its popular significance as implying deviation from probity. The word "dishonestly" is used in this Code should not, therefore, be confused with the commonly used word "dishonestly" which is understood to involve an element of fraud or deceit. Mere doing of something with the intention to cause wrongful gain or wrongful loss to another is sufficient; it is not necessary that wrongful gain or wrongful loss should be caused. **A I R 1924 Lah. 253.**

A person gaining discharged from a person as a result of connivance of prison official entrusted with his custody, he can rightly be said to have escaped from custody. **P L D 1967 Kar. 428.**

25. "Fraudulently" : A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise.

COMMENTS

Fraudulently : The intention with which an act is done is very important in determining whether the act is done 'dishonestly' or 'fraudulently.'

Where an offence depends upon proof of intention the Court must have proof of facts sufficient to justify it in coming to the conclusion that the intention existed. No doubt one has usually to infer intention from conduct and one matter that has to be taken into account is the probable effect of the conduct. But that is never conclusive. **39 Bom. L R 1184.**

By 'fraud' is meant an intention to defraud; whether it be from an expectation of advantage to party himself or from ill-will towards the other is immaterial. **I L R 13 Bom. 515.**

Deceit in the first element in fraud : A person is deceived when he is induced to believe as true that which is untrue. The means of deceit are false representations, and representations only be made by writing, words, or conduct. **3 Cr. L J 160.**

The expression 'intent to defraud' includes the deceit which is likely to cause any damage or loss to person deceived in respect of his property or otherwise. **A I R 1926 Lah. 385.**

The difference between an act done dishonestly and an act done fraudulently is that if there is the intention by the deceit practised to cause wrongful that is dishonesty but even in the absence of such an intention, if the deceitful act wilfully exposes any one to risk to lose there is fraud. **I L R 16 Pat. 688.**

Fraudulently and dishonestly : There is a real distinction between the meaning of the terms 'fraudulently' and 'dishonestly'; the former denotes as intention to deceive. The difference between an act done dishonestly and an act done fraudulently is that if there is the intention by the deceit practised to cause wrongful loss that is dishonesty, but even in the absence of such an intention, if the deceitful act wilfully exposes anyone to risk of loss, there is fraud. The production of a forged bond by a person in a suit with the intent to make the Court believe that he was entitled to recover money upon the basis of the particular document produced, though it may not be dishonest within the meaning of Section 24, may yet be fraudulent within the meaning of Section 471. **P L D 1956 Kar. 489.**

26. "Reason to believe" : A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing but not otherwise.

COMMENTS

A person can be supposed to know when there is a direct appeal to his senses. A person "has reason to believe" if he has sufficient cause to believe the thing.

The word 'believe' is much stronger than the word 'suspect' and it involves the necessity of showing that the circumstances were such that a reasonable man might have felt convinced in his mind that the property with which he was dealing was stolen property. It is not sufficient in such a case to show that the accused was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired. **A I R 1932 Lah. 434.**

The words used are "if he has sufficient cause to believe" and not "if there is sufficient cause to believe". This shows that mere existence of a sufficient cause is not enough if it was not brought to his knowledge. Sufficient cause must exist and he must know of its existence, otherwise he has no "reason to believe a thing".

27. Property in possession of wife, clerk or servant : When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.

Explanation : A person employed temporarily on a particular occasion in the capacity of a clerk, or servant, is a clerk or servant within the meaning of this section.

COMMENTS

Property in Possession : The doctrine expressed in this section is that property in the possession of a person's wife, clerk or servant is deemed to be in that person's possession. This section abrogates the distinction made by English Law between 'possession' and 'custody'. **I L R 44 Cal. 477.**

A man's goods are in his possession, not only while they are in his house, or on his premises, but also when they are in a place where he may usually send them (as when horses and cattle feed on common land), or in a place where they may be lawfully deposited by him, as where he buries money or ornaments in his own land, or puts them in any other secret place of deposit.

Thus where Government property is in the possession of a Government servant, it shall be deemed to be in possession of the Government. **P L D 1960 S C 168.**

'Wife' : When a man furnishes a house for his mistress's occupation, he may reasonably be presumed to be in possession of all articles therein which can reasonably be inferred to belong to him or to be in the possession of his mistress on his behalf. But the inference must be inapplicable to articles of which the mistress is in possession illegally or contrary to the provisions of law, especially when the article in question is such that he might well remain in ignorance that it was in his mistress's possession. **20 P R 1914.**

'Clerk or servant' : The possession by clerk or servant of that which belongs to the master, or of that which, whether it belongs absolutely to his master, or to another person, the clerk or servant holds for his master and on his account, is the master's possession. The possession of the servant must be on account of his master to make the master liable. A pistol was discovered lying on the floor of a shop which could not reasonably be expected to be dealing in such articles. At the time of the discovery the shop was in charge of a servant and there was no proof that he was holding the pistol for his master. It was held that the master was not liable. **P L D 1960 S C 168.**

Recovery : Pistol allegedly recovered on night of occurrence but not sealed into a parcel then and there and sealed two days later, no explanation was given for delay, recovery was held to be doubtful. **P L D 1981 Pesh. 23.**

28. "Counterfeit" : A person is said to be "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.

Explanation 1 : It is not essential to counterfeiting that the imitation should be exact.

Explanation 2 : When a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed, until the contrary is proved, that the person so causing the one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised.

COMMENTS

Counterfeit : The word 'counterfeit' occurs in offences relating to coins provided in Chapter XII, and offenses relating to trade and property marks in Chapter XVIII. The word 'counterfeit' does not connote an exact reproduction of the original counterfeit. The difference between the counterfeit and the original is not therefore limited to a difference existing only by reason of faulty production. **A I R 1938 Nag. 192.**

To make a thing counterfeit two elements are necessary as described in this section :--

- (1) The counterfeit must resemble the original.
- (2) There should be an intention to practise deception by means of that resemblance or knowledge that by means of that resemblance, deception would be practised. It is not essential element to bring the counterfeit within the penal provisions of this section that resemblance should be exact.

Under this section it is not necessary to show that deception actually took place. Intention to practise deception by causing one thing to resemble another is quite sufficient.

For a thing to be 'counterfeit' there should be some sort of resemblance sufficient to cause deception. If there is so such resemblance, it cannot be said to be 'counterfeit', e.g., a counterfeit currency-note which would not even deceive a villager. **I L R 51 All. 470.** The word 'counterfeit' does not connote an exact reproduction of the original counterfeited. The difference between the counterfeit and the original is not, however, limited to a difference existing only by reason of faulty reproduction. **A I R 1938 Nag. 199.**

Thing : The thing counterfeited may be a coin or a piece of metal. Its value is immaterial. The counterfeit coin may be more valuable so far as money value is concerned than the coin for which it is intended to pass.

It would amount to counterfeiting even if the limitation is not exact and there are differences in detail. So long as the resemblance is so close that deception may thereby be practised it would amount to counterfeiting. **P L D 1960 S C 660.**

29. Document : The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1 : It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of justice, or not.

Illustrations

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A Power-of-Attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2 : Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letter, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

COMMENTS

Document : The term 'document' seems to include everything done by the pen, by engraving, by printing, or otherwise, whereby is made on paper, parchment, wood or other substance a representation of words or other equivalents addressed to the eye. This word occurs in Sections 167, 175, 192, 204, 464 and 479.

This section defined the word document. It has also been defined in Qanun-e-Shahadat Order, 1984, and General Clauses Act, the definitions are almost similar under all these three Acts.

Definition under Qanun-e-Shahadat Order, 1984 : Article 2 (b), says that documents means any matters expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used or which may be used for the purpose of recording that matter.

Definition under General Clauses Act : Section 3 (16) of the General Clauses Act, says that "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks or by more than one of those means which is intended to be used or which may be used, for the purpose of recording that matter. (Note the difference between the words "means" and "shall include"). Here in the present section, the word "denotes" is used instead and rest of the words are exactly the same except the last few words which read "as evidence of that matter" in place of "for the purpose of recording that matter".

Letters or marks imprinted on trees and intended to be used as evidence that the trees had been passed for removal by a Ranger of a forest, are a document. **27 Bom. L R 559.**

30. "Valuable security" : The words "valuable security" denote a document which is, or purports to be a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

Illustration

A writes his name on the back of a bill of exchange. As the effect of this endorsement is to transfer the right to the bill to any person who may become the lawful holder of it, the endorsement is a "valuable security".

COMMENTS

Valuable Security : The words "valuable security" denote such documents as create or extinguish legal rights. A document conferring or creating rights is a valuable security even though all the signatures while it is intended to obtain, or is necessary to obtain, have not been affixed. **A I R 1918 Mad. 150.**

'Which is, or purports to be' : The use of the words "which is, or purports to be" indicates that a document which, upon certain evidence being given, may be held to be invalid, but on the face of it creates, or purports to create, a right in immovable property, although a decree could not be passed upon the document, comes within the purview of this section. **I L R 48 All. 140.**

A *vakalatnama* does not on the face of it purport to create, extend, transfer, restrict, or extinguish a right and as such it cannot be deemed to be a valuable security within the meaning of this section. **1970 D L C 794.**

The forged school certificate was not a 'valuable security'. Conviction under Section 471 read with Section 467 was altered to one under Section 471 read with Section 465. **K L R 1982 C.C. 113.**

31. "A will" : The words "a will" denote any testamentary document.

COMMENTS

Will : A will is an instrument by which a person makes a disposition of his property to take effect after his death. The term has been used in Sections 467 and 477 of the Penal Code. A testament is a declaration of the last will of a person as to what he desires to be done after his death.

32. Words referring to acts include illegal omissions : In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omission.

COMMENTS

This section simply says that acts include illegal omissions.

Acts : An 'act' generally means something voluntarily done by a person. 'Act' is a determination of the will, producing an effect in the sensible world. This word includes writing and speaking, or, in short, any external manifestation. In the Code the term 'Act' is not confined to its ordinary meaning of positive conduct of doing something but includes also illegal omission.

Omissions : This word is used in the sense of intentional non-doing. Thus, according to this section, 'act' includes intentional doing as well as intentional non-doing. The omission or neglect must no doubt be such as to have as active effect conducing to the result, as a link in the chain of facts from which an intention to bring about the result may be inferred. **(1886) 1 Weir 549.** The Code makes punishable omissions which have caused, which have been intended to cause, or which have been known to be likely to cause, a certain evil effect in the same manner as it punishes acts, provided they were illegal. And when the law imposes on a person a duty to act, his illegal omission to act renders him liable to punishment. **A I R 1934 Lah. 813.**

33. "Act"; "Omission" : The word "act" denotes as well a series of acts as a single act; the word "omission" denotes as well a series of omissions as a single omission.

COMMENTS

Act : The word 'act' is nowhere defined. It must necessarily be something short of a transaction which is composed of a series of acts but cannot, in ordinary language, be restricted to every separate willed movement of a human being, for when we speak of an act of shooting or stabbing, we mean the action taken as a whole, and not the numerous separate movements involved. **A I R 1931 Bom. 409.**

The effect of Section 32 and this section taken together is that the term 'act' comprises one or more acts or one or more illegal omissions.

Where an accused person commits two (or more) acts, closely following upon and intimately connected with each other, they cannot be separated and assigned, the one to one intention and the other to another, but both must be ascribed to the original intention which promoted the commission of those acts and without which neither could have been done. **(1939) 18 Pat. 485.** An act may constitute an offence under two or more enactments. **A I R 1924 Mad. 487.**

34. Acts done by several persons in furtherance of common intention : When a criminal act is done by several persons, in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone.

COMMENTS

Applicability : Section 34, P.P.C. is attracted when all the persons involved have the common intention and the alleged act is committed by any of the persons in furtherance of the common intention. **1995 MLD 379(b).**

Section 34 embodies rule of vicarious liability for an act done in furtherance of common intention of all. From evidence brought on record, it is quite clear that all the three appellants who are real brothers, had a common motive/grievance against deceased. It is also in evidence that on day of occurrence, all the three appellants came to spot together, two of them were armed with guns and third was having a knife. *Held:* Act of firing by appellant No. 1 at deceased, was in furtherance of common intention fully shared by other appellants and they have rightly been held vicariously liable for murder. Appeal partly allowed by converting death sentence of appellant No. 1 to imprisonment for life. **PLJ 1995 SC 684 (i) = PLD 1996 SC 122.**

Scope : The section deals with the doing of separate acts, similar or diverse, by several persons; if all are done in the furtherance of a common intention, each person is liable for the result of all of them as if he had done them himself. In other words this section deals with joint or constructive liability of offenders where they act in furtherance of a common intention.

According to the case of *Chutta v. State*, **1995 P Cr. L J 755.** Section 34; P.P.C. merely indicates the principle of joint liability. It neither creates any distinct offence nor amounts to an offence by its own force.

This section neither creates an offence nor amounts to an offence by its force; it merely lays down the principle of joint liability. **P L D 1969 S C 158.**

This section is intended to meet cases in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention of all. The reason why all are guilty in such case is that the presence of accomplices gives encouragement, support and protection to the person actually committing an act.

Normally Section 34 would not apply, if the fight has begun suddenly, and even person who took part in the fight would be responsible for his individual acts. **N L R 1981 A C 142.**

Whether the petitioners exceeded the right of self-defence or they could be convicted for vicarious liability under Section 34, P.P.C. Question needed consideration. The execution of sentence was suspended. **1982 P Cr. L J 1163.**

Common intention within the meaning of Section 34 implied a pre-arranged plan. To convict the accused of an offence applying Section 34, it should be proved that the Criminal Act was done in concert pursuant to the pre-arranged plans. **N L R 1980 Criminal 517.**

Ingredients of the section : A careful reading of the section shows that it becomes applicable only when--

- (i) a criminal act is done;
- (ii) by several persons;
- (iii) in furtherance of common intention of all.

(i) Criminal Act : Every act which is done is not a criminal act. Only that act which is prohibited by law and is carried out in violation of the limits prescribed by law is a criminal act. Thus where it was found that the accused party had not gone for assaulting but had gone to protect their own rights, it was held that they were not liable under Section 34.

Section 33 lays down that the word 'acts' denotes as well as series of acts as a single act and the word 'omission' denotes as well a series of omissions as a single omission. Thus when a criminal act is done by the several persons, it means criminal acts are done by several persons.

The word 'act' contemplated by this section envisages physical act and not merely a mental act. Thus contribution in action is an essential ingredient for invoking the aid of Section 34.

(ii) By several persons : One of the ingredients of this section is that the act is done by several persons. It means that act is to be done by persons more than one involved as in case of single accused there is no question of joint liability or of common intention. Common intention or joint liability could only be conceived if more than one person takes part. This section can obviously apply in cases where the accused is more than one. It may be more than five in which case the assembly would automatically become unlawful assembly and Section 149 will come into play. The only difference between Section 34 and Section 149 is that while in the former case common intention is necessary while in the latter case common object is necessary.

(iii) In furtherance of common intention : For bringing the offence under Section 34, it is necessary that the act done by several persons should be proved in furtherance of common intention of all the persons involved. In some cases such a thing is not easy to be proved, and as such common intention and the doing of act in furtherance of it is to be proved by evidence and circumstances of the case. However, no presumption can be made of the sharing of common intention unless the facts of irresistible character are brought on record.

It may be pointed out that Section 34, P.P.C. contemplates an act in furtherance of common intention and not the common intention simpliciter and that there is a marked distinction between a similar intention and common intention and between knowledge and common intention. It may also be observed that mere presence of an accused at the place of incident with a co-accused who commits offence may not be sufficient to visit the former with the vicarious liability but there should be some strong circumstance manifesting a common intention. Generally common intention *inter alia* precedes by some or all of the following elements namely common motive, pre-planned preparation and concert pursuant to such plan. However, common intention may develop even at the spur of the moment or during the commission of the offence as pointed out hereinabove. Conversely common intention may undergo change during the commission of offence." **1997 PCr.LJ 1421.**

Principle : It is a well-recognized canon of criminal jurisprudence that the Courts cannot distinguish between co-conspirators, nor can they inquire, even if it were possible, as to the part taken by each in the crime. Where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose; as the purpose is common so much be the responsibility. **P L D 1957 S C (Pak.) 207.**

Distinction between Section 34 and Section 149 : Section 149 stipulates the commission of an offence by any member of unlawful assembly. The offence must be committed in prosecution of the common object. It postulates the assembly of five or more persons having common object. The distinguished feature of Section 34 is the element of participation in action whereas the membership of the assembly at the time of commission of the offence is important element under Section 149. Section 34 embodies a doctrine of joint liability in the doing of a criminal act and the essence of that liability is the existence of common intention.

Sections 34 and 149 pointwise are distinguished as follows :--

- | | |
|---|---|
| 1. Section 34 expounds a doctrine of criminal liability and does not create a distinct offence. | Section 149 creates a distinctive offence and deals with that offence alone. |
| 2. Common intention pre-supposes pre-arranged plan. | Being a member of unlawful assembly one becomes liable. |
| 3. When criminal act is done by two or more persons with common intention, Section 34 comes into play. | Section 149 applies when there is unlawful assembly of five or more persons with some common object. |
| 4. In the furtherance of common intention of all, all the accused must be present on the spot and all of them must participate in the commission of criminal act. | Common intention is not but common object is condition precedent and it is not necessary that all the accused must be present at the time of the commission of the offence. Any or more members of unlawful assembly if prosecute the common object, they are liable. |

This section deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in first part, because they refer to it. **P L D 1957 S C (Pak.) 261.** This section refers to cases in which several persons both intend to do and do an act. **P L D 1959 Lah. 950.**

Vicarious liability : Essence of liability envisaged under Section 34, P.P.C. lies in the existence of a common intention and to attract it the criminal act complained of has to be shown to have been done by one of the accused in furtherance of common intention of all. **P L J 1995 SC 684 (1) P L D 1996 S C 122 (c).**

If the act committed by an accused appears to have been done independently without being influenced by the instigation of other accused, then the alleged instigator cannot be convicted and sentenced under the garb of S. 34, P.P.C. **1997 M L D 1072 (b).**

Common intention : In the case of *Imam Bux v. State*, **P L D 1983 S C 35.** The Full Bench of the Supreme Court explained common intention and held that: Section 34 of the Penal Code, 1860 is intended to meet a case in which it may be difficult to distinguish between the acts of individual members of a party who act in furtherance of the common intention of all. It does not create a distinct offence but merely enunciates a principle of joint liability for acts done in furtherance of common intention of the offenders. The essence of liability is to be

found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. Common intention usually consists of some or all of the following elements: Common motive, preplanned preparation and concert pursuant of such plan. Common intention, however, may develop even at the spur of the moment or during the commission of the offence. Conversely common intention can also undergo a change and disappear at the spur of the moment or in the course of the transaction. Intention is a mental condition and has often to be gathered from the facts and the surrounding circumstances of the case as direct evidence is very often not forthcoming. It is true that common intention might be spelt out from the elements which follow: Common motive, common preplanning, preparation and concert pursuant of such planning. But these are not exhaustive of all the elements relevant in this behalf. Common intention can also develop even at the spur of the moment prior to the main offence or even during the commission of similar or lesser offence. Not only that, and this is important, conversely, common intention can also undergo change at the spur of the moment prior to the offence or even during a transaction. In other words, it is not impossible to visualise in law, that if two or more persons had common intention before the commencement of a criminal act, it can be changed either to a different intention (may be of a lesser crime) or negation of crime; and proceeding further, the commonness regarding a certain intention might be abandoned at any stage. Common intention within the meaning of Section 34 implies a pre-arranged plan, and that the criminal act was done pursuant to the pre-arranged plan. The said plan may also develop on the spot during the course of the commission of the offence. **1973 P Cr. L J 904.** Common intention may develop in the course of the transaction constituting the offence and may be gathered from the number and nature of injuries. **P L D 1953 Lah. 382.**

Very often a Court is prejudiced against an accused because of his association with another whom the Court convicts. The Courts think that "Birds of the same feather flock together". There is no complete safeguard against such prejudice in cases of joint trial. However, judicial pronouncements have always administered a caution in cases where a person is sought to be convicted on the ground of his animation with common intention. **P L D 1979 Kar. 72.**

Existence of common intention which usually consists of motive, pre-concert and pre-arrangement cannot always be proved by direct evidence and it being a state of mind can only be inferred from the attendant circumstances of the crime. **P L D 1966 S C 122 (d).**

Common intention implies acting in concert and existence of pre-arranged plan and that is to be proved either from conduct of accused or prevailing circumstances at the time of occurrence or from any incriminating facts. **1995 P Cr. L J 765.**

Application of Section 34, P.P.C. did not hinge on Police report under Section 173, Cr.P.C. The question of application of Section 34 would depend on evidence produced in the Court. The accused attributed only a *lalkara* and nothing further was to indicate his having knowledge and his co-accused carried a knife with him. The accused was given benefit of doubt and was acquitted, in circumstances. **1982 P Cr. L J 466.**

Where there is no evidence of common design this section is not applicable. In order to attract Section 34 it is not sufficient to prove that an offence is a likely consequence of a common intention, the prosecution must show that the offence committed was covered by the common intention. **P L D 1960 Kar. 38.**

Where out of four accused two were unarmed, but rendering deceased powerless by grabbing arms while other two delivering fatal blows with knife on victim. It was held that the accused were motivated by common intention. **P L D 1971 Kar. 817.**

It implies that criminal act was done by several persons in concert pursuant to pre-arranged plan. **N L R 1980 Cr. L J 417.**

To attract Section 34, it has to be established that accused was animated with common intention as distinct from similar intention. **P L J 1980 Cr. C. Kar. 427.**

Section 34 operates only when criminal act is done by an individual in furtherance of common intention found as a fact. Conditions requisite for applicability of section (i) accused's presence at scene of occurrences; (ii) actual participation; and (iii) preconcert or pre-arranged plan. **1980 P Cr. L J 654; P L J 1980 Cr. C. 458.**

Proof : Strict proof of common intention of concerned persons is normally not possible, but the same can be conveniently gathered from set of circumstances brought forth in every case. **1998 SCMR 2146.**

'Common intention and common object' : Common object and common intention are not synonymous. The distinction between Sections 34 and 149 is sharp and defined. The common intention may, no doubt, grow in the course of the event. A common intention or common object is a thing which cannot always be proved by direct evidence and it should be inferred from the surrounding facts and circumstances of the case. But in a case of rioting, the facts and circumstances which constitute the common object of the unlawful assembly may not by itself be always sufficient to attract the common intention of the party. A common intention and common object should not be mixed up together. The common intention and common object are not synonymous in any way and they have got their distinguishable features. The distinctions between Sections 34 and 149, P.P.C. are now well-settled. Section 34 of the Penal Code applies in the circumstances given in the section. If the charge be one under Sections 302/149, P.P.C. there is no difficulty. If the prosecution wants to take aid of Section 34, P.P.C. Some additional materials are necessary to attract the application of that section. In order to bring the case within the mischief of Section 34 it is essential that some additional circumstances, beyond the materials necessary to prove rioting, should be brought on record to show that there was a pre-concert or mixing of minds to do a thing other than the thing for which the common object was formed. There should be some materials on record to justify the findings of common intention and in the absence of any circumstances or evidence such common intention should be incapable of being gathered in a case. In some cases the possibility of developing common intention during the course of the event cannot altogether be excluded but to justify such an inference, the prosecution must produce some materials. The inference of common intention in each case should be deduced from facts and circumstances of the case. **1970 D L C 663.**

"Common intention" and "common object"--Distinction : Lot of difference exists between "common intention" defined under Section 34, P.P.C. and "common object" defined under Section 149, P.P.C. Common intention can be developed even at the spur of the moment, but common object cannot be so developed. Lesser the number of people gathered together, the greater would be chances of developing common intention in the shortest and quickest possible time while the minds of five or more than five persons could not react together (excepting mob psychology in some cases) suddenly in unison, without their having made preparation and having thought out the whole plan. **1998 P Cr. L J 1192.**

The grievous injury on chest of the injured prosecution witness specifically attributed to co-accused and prosecution yet to prove application of Section 34, P.P.C. against the petitioners, but bail was granted in circumstances. **1977 P Cr. L J 302.**

Sections 149 and 34 cannot be invoked for application of Section 397. **1975 P Cr. L J 1304.**

Ascertainment of antecedents of witnesses for determining their credibility (), should precede rather than follow examination of witnesses. **1977 P Cr. L J 372.**

The deceased woman, victim of rape, having been brought to Civil Hospital at 11 a.m., doctor due to her condition being very critical at once writing to local police station, police officer arriving and recording her statement by 11-20 a.m. and sending statement by 11-30 a.m. to police station concerned for registration of case. Five documents including dying statement on record bearing signatures of Doctor witness and all signatures in same ink. Mere omission on part of Public Prosecutor or Inquiry Magistrate to ask the Doctor whether he was

present when dying statement was recorded and whether he signed it would not in circumstances detract from fact of his presence at time of recording of dying statement and of his having told police regarding fitness of victim to make a conscious statement. No evidence of dying declarant having been tutored by her relatives to falsely implicate appellants. Prosecution witnesses deliberated and bearing no grudge against appellants. Statement also recorded in operation theatre of Hospital excluding all possibility of presence of any outsider. Dying declaration further corroborated by finger nail injuries given to accused by victim of rape on his cheeks and neck. Eye-witnesses and witnesses of recovery having been won over, reliance could be placed on statement of investigating officer and omission in daily day of receipt of sealed parcels of such articles of no avail since such facts have to be noted in Register Malkhana and not in daily diaries. Dying declaration, corroborated by recoveries of incriminating articles and accused rightly convicted. **1977 S C M R 129.**

Where act of killing the deceased appeared to be individual act of the accused and there was total absence of any evidence which showed preconcert of co-accused of conspiracy to murder or that co-accused in any way active so as to cause death of deceased. No inference of common intention to commit murder could be drawn against the co-accused in circumstance. **1974 P Cr L J 29.**

"Common intention" and "similar intention". Distinction : Similar intention by itself is not enough to bring the case within the ambit of Section 34, P.P.C. For applicability of Section 34, P.P.C. it has to be conclusively established that the persons concerned had common intention for committing the criminal act which was in concert pursuant to pre-arranged plan. **1994 P Cr. L J 1640.**

Furtherance of common intention. Determination of : Utterance of certain damaging words by an accused to instigate an offender to commit an offence may not amount to an act committed in furtherance of common intention to attract Section 34, P.P.C, unless prosecution proves that offence so committed was result of influence and control of instigator over offenders who had committed that offence. It is, therefore, necessary for Court to find out whether co-accused while committing an offence were acting independently or they were under influence and control of accused who instigated them. If act committed by an accused appears to have been done independently without being influenced by instigation of other accused then alleged instigator cannot be convicted and sentenced under the garb of Section 34, P.P.C. **P L J 1996 Cr. C. 1481(1); 1997 M L D 1072.**

One of several accused not taken part in assault on person killed--Liability : The appellant and four others were tried for murder. Two of the accused persons were acquitted, but the appellant and the remaining two were convicted under Section 302 read with Section 34, Pakistan Penal Code, and their conviction was upheld by the High Court. The appellant contended in the Supreme Court that the common object of the assailants was to regain a bough which had been taken away by a brother of the deceased and that since the appellant took no part in the attack on the deceased he could not be said to have shared the common intention of the co-accused who had killed the deceased. The evidence showed that when their demand for the return of the bough was refused, the assailants armed themselves with lethal weapons, went to the *behk* of the complainants and without making any attempt to regain the bough surrounded the deceased and his brothers, attacked all three of them when they were attempting to fire, killing one of them and injuring the other two, and then lifting the bough marched back triumphantly to their *dera*. The facts conclusively proved that the assailants' intention was to kill and then take away the disputed bough. Section 34, Pakistan Penal Code was therefore clearly applicable to their case and though the appellant himself took no part in the assault on the deceased, the killing must be held to have been in furtherance of the common intention of those who killed him and of the appellant. **1977 S C M R 340.**

Distinction between Sections 34, 107 & 114 : It would be evident from the plain reading of Sections 34, 107 and 114, P.P.C. that they are quite distinct and separate in their intent and scope. Section 34 enunciates the principle of constructive liability in regard to an act

committed by several persons in furtherance of their common intention. Section 107 defines the offence of abetment, whose mode of punishment, is elaborated in Sections 109, 117 to 120, P.P.C. The basic differences between the two provisions is highlighted by Explanations 2 and 3 to Section 108 which define an abettor. It becomes abundantly clear that the actual commission of the abetted act is not a *sine qua non* of the offence of abetment nor so is the guilty intention or knowledge of the person abetted or its community with the abettor. The distinction between abetment as defined in Section 107, P.P.C. and constructive liability under Section 34, P.P.C. lies in this, that under the former an offender can be convicted for the offence which he actually abets regardless of the ultimate result achieved whereas under Section 34 all the persons accused of the offence are in the eyes of law united in their intention in carrying out of the actual act committed in furtherance of their common intention. The provision contained in Section 144, P.P.C. is rather evidentiary and not punitive. Once an abettor is personally found to be present at the spot then he is liable as principal but would be punished only once and to that extent there remains little difference between an abettor personally present as envisaged by Section 114, P.P.C. and a co-accused sharing community of intention as contemplated by Section 34, P.P.C. It is well established that common intention though not shared at an earlier stage could still be formed at the spur of the moment in the circumstances of a given case. **P L D 1979 Lah. 951.**

35. When such an act is criminal by reason of its being done with a criminal knowledge or intention : Whenever an act, which is criminal only by reason of its being with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

COMMENTS

Scope : Under this section a person assisting the accused, who actually performs the act, must be shown to have the particular intent or knowledge if the act is criminal only by reason of its being done with a criminal knowledge or intention.

The difference between this section and preceding section is that if several persons having one and the same criminal intention jointly commit an offence each one is liable for the offence if he had acted alone but if several persons join in an act each having a different knowledge and intention each is liable according to his own criminal intention or knowledge and he is not liable for vicarious liability of others. Section 34 as well as this section does not provide that those who take part in the act are jointly liable for the same offence. These only say that each of the performer shall be liable for the act in the same manner as if the act were done by him alone.

This section makes it clear that where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention, each person is liable for the act to the extent of the knowledge or intention; in other words, the Court or the jury have to consider what is the knowledge or intention with which each person joined in the act. *A and B beat C who dies. A intended to murder him and knew that the act would cause death. B only intended to cause grievous hurt and did not know his act would cause death or such bodily injury as was likely to result in death. A is guilty of murder and B of causing grievous hurt.*

36. Effect caused partly by act and partly by omission : Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Illustration

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

37. Co-operation by doing one of several acts constituting an offence : When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Illustrations

(a) A and B agree to murder Z by severally and at different times giving him small dose of poison. A and B administer the poison according to the agreement with intent to murder Z. Z dies from the effects of the several dose of poison so administered to him. Here A and B intentionally co-operate in the commission of murder and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(b) A and B are joint jailors, and as such, have the charge of Z, a prisoner, alternately for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

(c) A, a jailor, has the charge of Z, a prisoner. A intending to cause Z's death, illegally omits to supply Z with food; in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder, but as A did not co-operate with B, A is guilty only of an attempt to commit murder.

COMMENTS

Scope : This section is a corollary of Section 35. It provides that when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all) makes the actor liable to be punished for the commission of the offence. **I L R 52 Cal. 197.**

Distinction between Section 34 and Section 37 : The distinction between this section and Section 34 is that while the former deals with intentional co-operation (which may not be the same as a common intention) in an offence committed by means of several acts, and punishes such co-operation (provided it consists in doing any of those acts either singly or jointly with any other person) as if it constituted the offence itself, Section 34 requires a common intention for a criminal act done by several persons, in which each actor becomes liable as if that act was done by him alone. Intentional co-operation must include action which contributes to the offence and is done with the consciousness that the offence is on foot though without sharing the intention to commit that offence. **A I R 1938 Pat. 258.**

38. Persons concerned in criminal act may be guilty of different offences : Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assist A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

COMMENTS

Scope : This section is the converse of Section 34 and provides for different punishments for different offences where several persons are concerned in the commission of a criminal act, whether such persons are actuated by one intention or the other.

Sections 34, 35 and 38 should be read together.

The basic principle which runs through Sections 34 and 38 is that an entire act is attributed to a person who may have performed only a fractional part of it. In Section 34 the emphasis is on the act. Sections 35 to 38 lay down a further rule by which the criminal liability of the doer of a fractional part (who is to be taken as the doer of the entire act) is to be adjudged in different situation of *mense rea*.

Section 38 indicates that person engaged in the commission of one act may be guilty of different offences owing to the difference to their intentions. For instance where a quarrel arose between C on the one side and A and B on the other, and C abused B, whereupon A struck him with a stick and B struck him down with an axe on the head and he had received two other wounds, with the axe on other parts of the body, it was held that B was guilty of culpable homicide while A was guilty of voluntarily causing hurt. **2 A W N 23.**

39. "Voluntarily" : A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustrations

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating robbery and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

COMMENTS

Voluntarily : The word "voluntarily" has, for purposes of the Code, been given an artificial meaning at variance with its ordinary sense. The definition overlooks the difference between "intention" and "knowledge of likelihood".

This section defines the word "voluntarily" by applying to it the test of "intention" which may be either express or implied.

The word is defined in relation to the causation of effects and not to the doing of acts from which those effects result. It has been given a peculiar meaning in the Code differing widely from its ordinary meaning. In general, the Code makes no distinction between cases in which a man causes an effect designedly and cases in which he causes it knowingly or having reason to believe that he is likely to cause it. If the fact is a probable consequence of the means used by him, he causes it "voluntarily", whether he really meant to cause it or not. He is not allowed to urge that he did not know or was not sure that the consequence would follow: but he must answer for it just as if he had intended to cause it. **M & M 21.**

40. "Offence" : Except in the chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, Chapter V-A and in the following sections, namely, Sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in Sections 141, 176, 177, 201, 202, 212, 216 and 441 the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

41. "Special law" : A "special law" is a law applicable to a particular subject.

COMMENTS

Special Law : This section defines "Special Law" as a law applicable to a particular subject, or a provision of law which is not applicable generally but applies to a particular or specified subject or class of subjects.

The special laws contemplated in Section 40 and this section are only laws, such as the Excise, Opium and Cattle Trespass Acts, creating fresh offences, that is, laws making punishable certain things which are not already punishable under the Penal Code. This Whipping Act is not a special law in the sense; it creates no fresh offences, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code. **A I R 1939 Mad. 87.**

42. "Local Law" : A "local law" is a law applicable only to a particular part of the territories comprised in Pakistan.

COMMENTS

Local Laws : Laws applicable to particular localities are termed local laws, e.g., Port Trust Acts, and Punjab Local Government Ordinance, N.-W.F.P. Crimes Regulations. A local law does not necessarily include all rules made under the provisions of a local law.

43. "Illegal"--"Legally bound to do" : The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action: and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

COMMENTS

Illegal : This section explains the word "illegal". Its essential ingredients are:

- (1) It is applicable to everything which is an offence;
- (2) It is applicable to which is prohibited by law;
- (3) It is applicable to which furnishes ground for a civil action.

The word 'illegal' covers not merely a tort but also a breach of contract which furnishes ground for a civil action, that is to say, in respect of which damages can be obtained under Section 73 of the Contract Act, or which can be enforced specifically. It has the same meaning as "unlawful". It is applicable to everything which is an offence, which is prohibited by law and which furnishes ground for a civil action.

Where in the absence of anything of show that Medical officers are debarred from attending to private cases in the Government Hospital the doctor received money for examining a private medico-legal non-cognizable case in excess of the sums specified in the relevant rules it was *held that* it did not amount to the gaining of money by illegal means; it may be a breach of rules inviting sanctions of a departmental character.

Legally bound to do : In terms of the explanations attached to the word 'illegal' in this section, viz., (1) everything which is an offence, (2) which is prohibited by law, (3) which furnishes a ground for a civil action, a person is said legally bound to do a thing when he is restrained to do a thing which is illegal for him to do. Thus a person is legally bound to do that what law specifically asks him to do and also that what law requires him not to omit to do. The

phraseology of this section not only covers offences and acts prohibited by law but are wide enough to cover cases of breach of contract and those arising out of common law or usage where a duty is voluntarily accepted, as in the case of contract, or is imposed out of the relation in which persons stand towards each other or towards the public to do something and the person criminally omits to perform that duty, for each of these cases furnishes ground for a civil action for one or more relief.

44. "Injury" : The "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

COMMENTS

Injury : "Injury" is an act contrary to law. (1874) 2 M H C 158. The word "injury" has been given a wide meaning in this section. It will include every tortious act. Thus an unlawful detention of a cart at a toll gate caused by an illegal demand for payment of toll amounts to injury. (1892) 1 Weir 441. Threat of a decree which can never be given effect to is a threat of harm to an individual in his person, reputation, or property. A I R 1923 Cal. 590. Threat to use the process of law for the purpose of enforcing payment of more than is due is illegal and such a threat made with such an object is a threat of injury. The threat of a decree that could not be executed by any competent authority is a threat of harm or injury. A I R 1940 Pat. 486. But a threat of a social boycott is not a sort of 'injury'. 1933 M W N 736.

Where a police officer arrested a person and released only when money was paid to him, it was held that action of the police officer amounted to putting the person in fear of injury. A I R 1942 Oudh. 163.

45. "Life" : The word "life" denotes the life of a human being, unless the contrary appears from the context.

46. "Death" : The word "death" denotes the death of a human being, unless the contrary appears from the context.

47. "Animal" : The word "animal" denotes any living creature, other than a human being.

48. "Vessel" : The word "vessel" denotes anything made for the conveyance by water of human beings or of property.

49. "Year" ; "Month" : Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British calendar.

50. "Section" : The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

51. "Oath" : The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant or to be used for the purpose of proof, whether in a Court of Justice or not.

52. "Good faith" : Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

COMMENTS

Good faith : Definition of "good faith" is merely a negative one. It does not define "good faith". It says that an act is only done in good faith if it is done with due care and attention. Absence of good faith means simply carelessness or negligence. **A I R 1938 Rang. 350.**

Good faith plays an important role in criminal cases because its presence affords a good defence in a number of cases. Good faith in criminal law is different from good faith as understood in civil law. If an act is not done with due care and attention it cannot be said to be done in good faith as far as criminal law is concerned. **A I R 1963 Pat. 326.**

Definition under General Clauses Act : Good faith is defined as "A thing shall be deemed to be done in good faith where it is in fact done honestly whether it is done negligently or not. The definition in the General Clauses Act is to apply to all Central Acts made after the commencement of the General Clauses Act if there is nothing repugnant in the subject or context as is clearly mentioned in the beginning of Section 3 which contains definitions. The Pakistan Penal Code became law in 1860, and, therefore, the definitions given in Section 3 of the General Clauses Act (X of 1897) can have no application to it. **P L D 1958 Lah. 747.**

Where a Kurk Ameen executes a warrant of attachment, the date of which has expired knowingly, he cannot be said to act in good faith. **A I R 1942 Oudh 57.**

Where a person, uneducated in matters of surgery, operated on a man for internal piles by cutting them out with an ordinary knife, and the man died from haemorrhage, it was held that he did not act in good faith although he had performed similar operations on previous occasions. **I L R 14 Cal. 566.**

4[52-A. "Harbour" : Except in Section 157, and in Section 130 in the case in which the harbour is given by the wife or husband of the person harboured, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or assisting a person by any means, whether of the same kind as those enumerated in this section or not, to evade apprehension].

COMMENTS

A person is said to harbour another person who has committed an offence or who is seeking to evade arrest when he supplies that other with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance or assist that other by any means, whether of the same kind as enumerated above or not, to evade arrest.

4. Section 52-A inst. by the Penal Code (Amendment) Act, VIII of 1942, S. 2.

CHAPTER III

OF PUNISHMENTS

1[53. Punishments : The punishments to which offenders are liable under the provisions of this Code are,--

- Firstly,* *Qisas;*
- Secondly,* *Diyat;*
- Thirdly,* *Arsh;*
- Fourthly,* *Daman;*
- Fifthly,* *Ta'zir;*
- Sixthly,* *Death;*
- Seventhly,* *Imprisonment for life;*
- Eighthly,* *Imprisonment which is of two descriptions, namely:--*
 - (i) Rigorous, i.e., with hard labour;*
 - (ii) Simple;*
- Ninthly,* *Forfeiture of property;*
- Tenthly,* *Fine].*

COMMENTS

Purposes of awarding punishment : Punishments are awarded to offenders for three purposes and these are said to be retributive, preventive and reformatory. While the wronged desire vengeance, the normative system or the legal system which prescribes the punishment aims at prevention of recurrence of similar misdeeds; the society considers that the chastisement provided would reform the offender. Human indiscretions in desires or in revenge, are limitless. Vendetta or rage over a trite case of insult or supposed insult might result in even a greater outrage. The revenge has to be contained. Undue harshness of punishment erodes deterrent character of the punishment with passage of time due to human insensitiveness developed as an instinctive reaction. And a narrative system which ignores social sensibilities of the society (which in the first instance prescribes the conduct and punishment for violators) gradually reduces its acceptability which is the ultimate requirement for success of any legal system. Therefore, sentencing in a rational society is a difficult and often delicate task. The competing demands of the victim, the society and the state have to be kept in view while prescribing any punishment for a crime. The punishment should satisfy the retributive teeth of the wronged, should be adequate enough to serve as deterrence for would be offenders and should also cater for the social morality. We have attended to the question of sentence keeping these factors in view. **1998 PCr.LJ 1946.**

Object : Principal object of punishment is the prevention of offences, and the measure of punishment must, consequently, vary from time to time according to the prevalence of a particular form of crime and other circumstances.

The section mentions ten kinds of punishments.

As regards infliction of punishments the following rules of practice have been generally followed :--

Section 53 subs. by the Criminal Law (Amendment) Act, II of 1997.

- (1) Every conviction must be followed by a sentence;
- (2) A sentence must be plain and complete in itself;
- (3) In case of a technical offence, a nominal sentence is sufficient to meet the ends of justice. **16 PR 1910 (Cr.)**.
- (4) The maximum sentence provided for by law represents the sentence to be inflicted in extreme case. **A I R 1929 All 919**.

The question of appropriate sentence is not one of law. Opinion of one Court with regard to the sentence that was passed in a particular case has no binding force on any other Court, even though the former Court may have been superior to the latter. A Court called upon to pass a sentence for a crime has to take all the circumstances of the case into consideration and the quantum of punishment imposed in other cases cannot be of much assistance. **P L D 1956 B J 5**.

1. Death : This is the highest form of punishment authorised by Law. There is growing volume of opinion against this form of punishment and several countries have abolished capital punishment. **5 & 6 Eliy 2, C. 11**.

It may be awarded as punishment for the following offences :--

- (1) Waging war against Pakistan. (S. 121).
- (2) Abetting mutiny actually committed. (S. 132).
- (3) Giving or fabricating false evidence upon which an innocent person suffers death. (S. 149).
- (4) Murder. (S. 302).
- (5) Abetment of suicide of a minor or insane, or intoxicated person. (S. 305).
- (6) Dacoity accompanied with murder. (S. 396).
- (7) Attempt to murder by a person under sentence of imprisonment for life if hurt is caused. (S. 307).
- (8) Murder committed during sentence of imprisonment for life. (S. 303).
- (9) Hijacking. (S. 403-B).

2. Imprisonment for life : Imprisonment for life is to be inflicted in the following offences :--

- (1) Waging or attempting to wage war or abetting waging of war against Pakistan. (S. 121).
- (2) Conspiracy to commit offence punishable by Section 121. (S. 121-A).
- (3) Collecting arms, etc., with intention of waging war against Pakistan. (S. 122).
- (4) Sedition. (S. 124-A).
- (5) Waging war against any Asiatic power in alliance with Pakistan. (S. 125).
- (6) Abetting mutiny or attempting to seduce a soldier, sailor or airman. (S. 131).
- (7) Abetment of mutiny if mutiny is committed in consequence whereof. (S. 132).
- (8) Giving or fabricating false evidence with intent to procure conviction of capital offence. (S. 194).
- (9) Giving or fabricating false evidence with intent to procure conviction or offence with imprisonment for life, etc. (S. 195).
- (10) Resistance or obstruction to lawful apprehension of another person. (S. 225).

- (11) Omission to apprehend or sufferance of escape on part of public servant in case not otherwise provided for. (S. 225-A).
- (12) Counterfeiting Pakistan coin. (S. 232).
- (13) Making or selling instruments for counterfeiting coin. (S. 233).
- (14) Counterfeit Government stamp. (S. 255).
- (15) Punishment for murder. (S. 302).
- (16) Punishment for culpable homicide not amounting to murder. (S. 304).
- (17) Abetment of suicide a child or insane person. (S. 305).
- (18) Attempt to murder. (S. 307).
- (19) Punishment for thug. (S. 311).
- (20) Causing miscarriage without woman's consent. (S. 313).
- (21) Death caused by act done with intent to miscarriage. (S. 314).
- (22) Act done with intent to prevent child being born alive or to cause it to die after birth. (S. 315).
- (23) Voluntarily causing grievous hurt by dangerous weapons or means. (S. 326).
- (24) Voluntarily causing grievous hurt to extort property to constrain illegal act. (S. 329).
- (25) Kidnapping or abducting in order to murder. (S. 364).
- (26) Habitual dealing in slaves. (S. 371).
- (27) Extortion by threat of accusation of an offence punishable with death or imprisonment for life. (S. 388).
- (28) Putting person in fear of accusation of offence in order to commit extortion. (S. 389).
- (29) Voluntarily causing hurt in committing robbery. (S. 394).
- (30) Dacoity with murder. (S. 396).
- (31) Punishment for belonging to gang of dacoits. (S. 400).
- (32) Criminal breach of trust by public servant or by bankers, merchant or agent. (S. 409).
- (33) Dishonestly receiving property stolen in the commission of a dacoity. (S. 412).
- (34) Habitually dealing in stolen property. (S. 413).
- (35) Mischief by fire or explosive substance with intent to destroy house, etc. (S. 414).
- (36) Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden. (S. 437).
- (37) House trespass in order to commit offence punishable with death. (S. 449).
- (38) Grievous hurt caused whilst committing lurking house-trespass or house-breaking. (S. 459).
- (39) All persons jointly concerned in lurking house-trespass or house-breaking by night punishable with death or grievous hurt caused by one of them. (S. 460).
- (40) Forgery of valuable security, will, etc. (S. 467).
- (41) Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under Section 467. (S. 472).
- (42) Having possession of document described in Section 466 or 467 knowing it to be forged and intending to use it as genuine. (S. 474).

- (43) Counterfeiting device or mark used for authenticating documents described in Section 467 or possessing counterfeit marked material. (S. 475).
- (44) Fraudulent cancellation, destruction, etc., of will, authority to adopt of valuable security. (S. 447).
- (45) Punishment for attempting to commit offence punishable with imprisonment for life or for shorter terms. (S. 511).

3. Imprisonment : Imprisonment is of two kinds, namely : (1) Rigorous, and (2) Simple. In the case of rigorous imprisonment the offender is put to hard labour, such as grinding the cord, drawing water, digging earth, cutting fire-wood, etc. In the cases of simple imprisonment, the offender is confined in jail and is not put to any kind of work.

The maximum period of imprisonment that can be awarded for an offence is fourteen years. (Sec. 55). The shortest term provided for an offence is twenty-four hours (Sec. 510), but the minimum is unlimited.

In the following cases the minimum term of imprisonment is fixed :--

- (1) If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, he shall be punished with imprisonment of not less than seven years. (S. 397).
- (2) If at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, he is punished with imprisonment of not less than seven years. (S. 398).

Generally speaking the Code has left to the discretion of the Court to inflict simple or rigorous imprisonment, but in the following cases the offender is punished with rigorous imprisonment without the alternative of simple imprisonment :--

- (1) Giving or fabricating false evidence with intent to procure conviction of an offence which is capital by any law for the time being in force. (S. 194).
- (2) Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft. (S. 382).
- (3) Robbery. (S. 392).
- (4) House-trespass in order to commit an offence punishable with death. (S. 449).

The following offences are punishable with simple imprisonment only:

- (1) Public servant unlawfully engaging in trade; or unlawfully buying or bidding for property. (Ss. 168, 169).
- (2) A person absconding to avoid service of summons or other proceeding, from a public servant, or preventing service of summons or other proceeding, preventing publication thereof or not attending in obedience to an order from a public servant. (Ss. 172, 173, 174).
- (3) Intentional omission to produce a document to a public servant by a person legally bound to produce such document; or intentional omission to give notice or information to a public servant by a person legally bound to give it or intentional omission to assist a public servant when bound by law to give assistance. (Ss. 175, 176, 187).
- (4) Refusing oath when duly required to take by a public servant; or refusing to answer a public servant authorised to question; or refusing to sign any statement made by a person himself before a public servant. (Ss. 178, 179, 180).
- (5) Disobedience to an order duly promulgated by public servant. (S. 188).

- (6) Escape from confinement negligently suffered by a public servant or negligent omission to apprehend, or negligent sufferance of escape on the part of a public servant in cases not otherwise provided for. (Ss. 223, 225-A).
- (7) Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding. (S. 228).
- (8) Continuance of nuisance after injunction to discontinue. (S. 291).
- (9) Wrongful restraint. (S. 341).
- (10) Defamation; printing or selling defamatory matter known to be so. (Ss. 500, 501, 502).
- (11) Uttering any word, or making any sound or gesture, with an intention to insult the modesty of a woman. (S. 509).
- (12) Misconduct in a public place by a drunken person. (S. 510).

4. Forfeiture : Absolute forfeiture of property was a punishment inflicted on persons guilty of high political offences. It could also be inflicted on persons guilty of offences punishable with death. It has been abolished by Act, XVI of 1921.

Forfeiture of specific property is retained as a punishment in the following cases :-

- (1) Whoever commits, or prepares to commit, depredation on the territories of any power at peace with the Government, shall be liable, in addition to other punishments, to forfeiture of any property used, or intended to be used, in depredation, or acquired thereby. (S. 126).
- (2) Whoever knowingly receives property taken as above-mentioned or in waging war against any Asiatic power at peace with the Government, shall be liable to forfeit such property. (S. 127).
- (3) A public servant, who improperly purchases property, which, by virtue of his office, he is legally prohibited from purchasing, forfeits such property. (S. 169).

5. Fine : Fine is the only punishment provided for in Sections 137, 154, 155, 156, 171-G, 171-H, 171-I, 278, 283, 290 and 294-A.

Whipping : The punishment added by the Whipping Act may be awarded as an alternative or an additional punishment for certain offence. It may be awarded as an alternative punishment for offences under Sections 378, 380, 382, 443, 444, 445 or 446. (Section 3 of the Whipping Act). It may be awarded in lieu of or as additional punishment for offences under Sections 375, 377, 390 or 391. (Section 4 of the Whipping Act). It may be awarded in lieu of any other punishment to Juveniles (persons under 16 for offences punishable under the Code except offence under Chapter IV, in Sections 153-A and 505, offences punishable with death. (S. 5, Whipping Act).

Detention in reformatories : Juvenile offenders sentenced to imprisonment may be sentenced to, and detained in a Reformatory School for a period of three to seven years, as provided for by Section 8 of Act, VIII of 1897.

54. Commutation of sentence of death : In every case in which sentence of death shall have been passed, the Federal Government or the Provincial Government of the Province within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code:

¹[Provided that, in a case in which sentence of death shall have been passed against an offender convicted for an offence of *qatl*, such sentence shall not be commuted without the consent of the heirs of the victim].

COMMENTS

Federal or Provincial Government cannot press into service jurisdiction conferred under Sections 401 and 402-B, Cr.P.C. to commute or remit sentence of convict in case where right of man is treated to be predominant. State, however, possess such right in cases of preponderance of right of Allah and composition being not permissible. **P L D 1980 S C 1.**

Commutation of sentences by Federal or Provincial Government, cannot press into service the jurisdiction conferred by Sections 401 and 402, Cr.P.C. or remit sentence of conviction in cases where right of man is treated to be predominant. **P L D 1980 F S C 1.**

But it has to be noted that in case of complete pardon by the heirs of the Maqtool Qatal-i-amd the perpetrator of the offence is not absolved of his liability to Tazir, as he is not purged of the 'Zulm' which he had committed on the society by taking life of a Masoom-ud-Dan, i.e., a human being whose life was not legally forfeited to the State in punishment of a crime. **P L D 1980 F S C 14.**

55. Commutation of sentence of imprisonment for life : In every case in which sentence of imprisonment for life shall have been passed, the Provincial Government of the Province within which the offender, shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years:

²[Provided that, in a case in which sentence of imprisonment for life shall have been passed against an offender convicted for an offence punishable under Chapter XVI, such punishment shall not be commuted without the consent of the victim or, as the case may be, of his heirs.]

COMMENTS

Scope : Under this section the Provincial Government has power to commute the sentence of imprisonment for life to punishment for imprisonment of either description for a term not exceeding fourteen years without the consent of the prisoner.

Release after completion of 14 years aggregate imprisonment no vested right accrues in favour of a life convict to be released automatically and unconditionally. He can be released only in exercise of powers under Section 401. It is for Provincial Government to consider rolls of prisoners for necessary action under Section 401 for remission to be ordinary, special or amnesty remissions. **N L R 1980 U C 381.**

In case of release after completion of 14 years aggregate imprisonment, no vested right accrues in favour of a life convict to be released automatically and unconditionally. He can be released only in exercise of powers under Section 401. It is for Provincial Government to consider rolls of prisoners for necessary action under Section 401 for remissions to be ordinary, special, or amnesty remissions **N L R 1980 U C 361.**

1. Proviso added by the Criminal Law (Amendment) Act, II of 1997.
2. Proviso added by the Criminal Law (Amendment) Act, II of 1997.

¹[55-A. Saving for President prerogative : Nothing in Section fifty-four or Section fifty-five shall derogate from the right of the President to grant pardons, reprieves, respites or remissions of punishment:]

¹[Provided that such right shall not, without the consent of the victim or, as the case may be, of the heirs of the victim, be exercised for any sentence awarded under Chapter XVI].

56. Sentence of Europeans and Americans to penal servitude : [Rep. by the Criminal Law (Extinction of Discriminatory Privileges) Act, 1949 (II of 1950), Schedule.]

57. Fractions of terms of punishment : In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty-five years.

COMMENTS

A sentence for imprisonment for life means "a sentence of imprisonment for the whole of the remaining period of the convicted person" natural life. There is no provision in the Penal Code, Code of Criminal Procedure or the Prison Act, where under a sentence of life imprisonment, without any formal remission by the appropriate Government under Section 401, Cr.P.C., can be automatically treated as one for a definite period. It was sometimes assumed that having regard to this Section, 20 years' imprisonment was equivalent transportation (now imprisonment) for life. **A I R 1945 P C 64.**

Sentence of imprisonment for life means "for remaining span of natural life" of convict, accepted, however, as being of twenty years' duration. Period not curtailed by Rules of 1965. Fourteen years' period is merely to serve as basis for calculated remissions. Convicts who have completed 14 years "including remissions of all kinds" are released by Provincial Government in exercise of powers conferred by the Criminal Procedure Code (V of 1898), Section 401. The convict cannot be detained for aggregate period exceeding twenty years. No vested right in convict to be released after completion of fourteen years' aggregate imprisonment. Rule 22(2) is taken to apply to all convicts whether they have earned special remissions or ordinary remissions. **P L D 1968 Lah. 1.**

Life imprisonment is not same as transportation for life. Life imprisonment means imprisonment for 25 years, whereas transportation for life means 20 years' rigorous imprisonment. **P L D 1975 Lah. 481.**

Sentences at one trial--Maximum aggregate imprisonment : Sentences of imprisonment for different offences tried jointly ordered to run consecutively cannot exceed imprisonment for life, i.e., 25 years under Section 57, P.P.C. **1997 P Cr. L J 1043.**

Right of self defence : Scene of occurrence must have been well lit for the viewers to see the performance of the dancing girls. Dying declaration was duly corroborated by the ocular testimony of three eye-witnesses two of whom were injured which was further supported by the medical evidence, recovery of blood-stained articles from the place of occurrence and total absence of any reason for false implication. Right of self-defence was not available to accused. Convictions and sentences ordered to accused by Trial Court were upheld in circumstances. However, sentences of imprisonment directed by Trial Court to run consecutively were ordered to run concurrently in order to bring the same in accord with the provisions of Section. 35, Cr.P.C. and Section. 57, P.P.C. **1997 PCr.LJ 1043.**

1. Section 55-A ins. by A.O., 1937.

58. Offenders sentenced to transportation how dealt with until, transported : *[Omitted by the Law Reforms Ordinance, XII of 1972, S. 2].*

59. Transportation instead of imprisonment : *[Omitted by the Law Reforms Ordinance, XII of 1972, S. 2].*

60. Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple : In every case in which an offender is punishable with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

COMMENTS

Scope : This section applies only to a case in which the offence is punishable with imprisonment of either description. It has no application to a case in which the offence is punishable with imprisonment for life which is a class of punishment different from imprisonment which is of two descriptions. Imprisonment for life is imprisonment of only one description, i.e., rigorous imprisonment.

Where the offender is punishable with imprisonment some sentence of future imprisonment, even if it be till the rising of the Court, must be passed. A sentence of imprisonment for the period already passed in the lock-up is illegal. **5 Cr. L J 217.**

61. Sentence of forfeiture of property : *[Repealed by the Penal Code (Amendment) Act, XVI of 1921, S. 4].*

62. Forfeiture of property, in respect of offenders punishable with death, transportation or imprisonment : *[Repealed by the Penal Code (Amendment) Act, XVI of 1921, S. 4].*

63. Amount of fine : Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

COMMENTS

The fine imposed should be such as is commensurate with the offence, the character and conduct of the accused, the circumstances leading to the commission of the offence, the degree of *mens rea* as well as with the financial circumstances of the accused. The fine should in no event be excessive or such as to make the accused feel that he is being persecuted instead of being prosecuted. **A I R 1953 Hyd. 155.**

64. Sentence of imprisonment for non-payment of fine : In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment,

and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine,

it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

COMMENTS

Scope : Offences punishable with death are excluded from the operation of this section.

The wording of (this section).....is not happy, but...the Legislature intended by it to provide for the award of imprisonment in default of payment of fine in all cases in which fine can be imposed. **P L D 1968 Lah. 1124.**

'Offence' : This word here means anything punishable under the Code or any special or local law.

'Imprisonment as well as fine' : The words 'as well as' do not mean here and, as will be seen from the concluding words of the first clause, viz., 'whether with or without imprisonment.' The words 'imprisonment as well as fine' include (a) offences punishable with imprisonment or fine in the alternative, and (b) offences punishable with imprisonment or fine, or both, cumulatively.

'It shall be competent' : It is not imperative to award a term of imprisonment in default of payment of the fine, (1878) **P R No. 30 of 1878**, it is merely permissive.

This section enables the Court in every case in which an offender is sentenced to fine to direct that in default of payment of the fine the offender shall suffer imprisonment. Imprisonment in default of payment of fine may be awarded even where the statute creating the offence provides only for the fine and not for imprisonment in default. **A I R 1957 S C 645.**

Section 64, Penal Code confers upon Court powers of imprisonment in default of payment of fine which often acts as a screw to make offender choose lesser of two evils. Trial Court should exercise a careful discretion in matter of super-imposing fines upon long substantive term of imprisonment. Imposition of fines on persons sentenced to death was held to be unnecessary. **P L D 1979 Kar. 261.**

"As well as fine" : The words "as well as" do not mean here "and" as will be seen from the concluding words of the first clause, viz., 'whether with or without imprisonment'. The words 'imprisonment as well as fine' include (a) offences punishable with imprisonments or fine in the alternative, and (b) offences punishable with imprisonment or fine, or both, cumulatively. **I L R 22 Mad. 238.**

In a case Lahore High Court held that no sentence in default of payment of fine was passed but it was directed that if the fine is not paid by the accused before the date fixed, warrant the issued for its realisation by sale and attachment of movable and immovable property of the accused. **P L D 1957 Lah. 142.**

Sentence of imprisonment in default of fine not to run concurrently with other sentence of imprisonment : A sentence of imprisonment in lieu of fine cannot be ordered to run concurrently with a substantive sentence of imprisonment. Section 64 of the P.P.C. permits two substantive sentences to run concurrently, but the sentence of imprisonment in lieu of fine has to be served out separately. That sentence cannot run concurrently with any other sentence of imprisonment. **P L D 1958 Kar. 634.**

65. Limit to imprisonment for non-payment of fine when imprisonment and fine awardable : The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

COMMENTS

Scope : This section applies to all cases where the offence is punishable with imprisonment as well as fine, i.e., cases where fine and imprisonment can be awarded, and also those where the punishment may be either fine or imprisonment, but not both. The only

cases that it does not apply to are those dealt with in Section 67 where fine only can be awarded. **I L R 22 Mad. 238.**

Under this section the term of imprisonment in default must not exceed one-fourth of the maximum term of imprisonment fixed for the offence, if the offence is punishable with imprisonment as well as fine. **P L D 1959 Lah. 851; P L D 1956 Dacca 108.**

Section 65 of the Penal Code lays down that the terms for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the terms of imprisonment which is the maximum fixed for the offence. The maximum term of imprisonment that can be awarded under Section 509, P.P.C. is one year and the Additional Sessions Judge was not competent to award rigorous imprisonment in default of payment of fine. **P L D 1959 (W.P.) Lah. 851.**

66. Description of imprisonment for non-payment of fine : The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

COMMENTS

Imprisonment awarded in default of payment of a fine may be of any kind which may be imposed for the offence.

The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence. Since S. 509 of the Penal Code, 1860, provides for simple imprisonment awarding rigorous imprisonment in default of payment of fine is not legal. **PLD 1952 Lah. 851; 1960 PLR W.P. 970.**

A Criminal Court is not competent to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. **A I R 1937 Mad. 362.**

67. Imprisonment for non-payment of fine when offence punishable with fine only : If the offence be punishable with fine only, the imprisonment which the Court imposes in default of payment of the fine shall be simple, and the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

COMMENTS

Object : This section has no application to an offence punishable either with imprisonment or with fine, but not with both. It refers only to cases in which the offence is punishable with fine only. A sentence of imprisonment in default of payment of fine must be in accordance with the scale laid down in this section, but in the case of Magistrates the term imposed must not be excess of their powers under Section 32 of the Criminal Procedure Code.

Where the trial Court imposed a fine but awarded no sentence in default of its payment the order being in contravention of this section was held to be not maintainable. **1975 P Cr. L J 246.**

68. Imprisonment to terminate on payment of fine : The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

69. Termination of imprisonment on payment of proportional part of fine : If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration

A is sentenced to fine of one hundred rupees and to four months' imprisonment in default of payment. Here, seventy-five rupees of the fine be paid or levied before the expiration of one month of the imprisonment. A will be discharged as soon as the first month has expired. If seventy-five rupees be paid or levied at the time of the expiration of the first month, or at any later time while A continues imprisonment. A will be immediately discharged. If fifty rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty rupees be paid or levied at the time of the expiration of those two months, or at any later time while A continues in imprisonment, A will be immediately discharged.

COMMENTS

Fine not refundable even when full imprisonment undergone : If the fine is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate; and if a proportion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place.

Where the accused was sentenced to a further term of imprisonment in default of payment of fine, and he paid a portion of the fine, but the fact was not made known to the jailor, and the accused underwent the full term of imprisonment, it was *held that* the Court had no power to order the fine to be refunded. The accused in such cases must apply to the Government. **4 Bom. H C R 37.**

70. Fine leviable within six years, or during imprisonment--Death not to discharge property from liability : The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period; and the death of the offender does not discharge from the liability of any property which would, after his death, be legally liable for his debts.

COMMENTS

Scope : This section prescribes the period of limitation within which fine may be levied. The procedure relating to the realisation of fine is provided in Section 386, Criminal Procedure Code.

Imprisonment in default of fine does not liberate the offender from his liability to pay the full amount of fine imposed on him. Such imprisonment is not a discharge or satisfaction of the fine but is imposed as a punishment for non-payment or contempt or resistance to the due execution of the sentence. The offender cannot be permitted to choose whether he will suffer in his person or property and even when his person ceases to be answerable for the fine, his property will for a time continue to do so. The bar of six years may save the property of the accused but not his personal arrest. The liability for any sentence of imprisonment awarded in default of payment of fine continues after the expiration of six years.

The mere fact that a Magistrate has written off a fine as irrecoverable, is no bar to his taking action to levy the fine within the time allowed by law, if it subsequently appears that the person from whom it was due has acquired the means of paying it. **26 A W N 275.**

71. Limit of punishment of offence made up of several offences : Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offence.

Illustrations

(a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, they might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily cause hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

COMMENTS

Scope : This section governs the whole Code and regulates the limit of punishment in cases in which the greater offence is made up of two or more minor offences. It is not a rule of adjective law or procedure, but a rule of substantive law regulating the measure of punishment, and it does not, therefore, affect the question of conviction, which relates to the province of procedure.

This section contemplates separate punishments for an offence against the same law and not under different laws. **P L D 1968 S C 259.**

The intention expressed in this section is that a Court in awarding punishment thereunder should pass one sentence for either or one of the offences in question and not a separate one for each offence. **11 Cr. L J 415.**

This section does not control High Court's revisional power to enhance sentence. **P L D 1958 B J 5.**

The rules for assessment of punishment are laid down in Sections 71 and 72 of the Penal Code and Section 35 of the Criminal Procedure Code. Section 3 of the Code of Criminal Procedure provides that when a person is convicted at one trial two or more offences, the Court may, subject to the provision of Section 71 of the Penal Code, sentence him for such offences to the several punishments prescribed therefor which such Court is competent to inflict; and in the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial by a higher Court. It, therefore, enhances the ordinary powers of sentences given to Magistrates by Section 32, Criminal Procedure Code.

Accused causing both simple and grievous injuries punishable under Sections 324 and 326, P.P.C., accused held could be convicted only under Section 326, P.P.C. and given one sentence and not two convictions and two sentences. The question of punishment for several offences under Section 71 read with Sections 324 and 326 was examined by Nasir Aslam Zahid, J. while delivering Judgment he observed: "The appellant had caused both grievous and simple injuries to Hussain Bux and the learned Additional Sessions Judge, Hyderabad has convicted the appellant under both Sections 326 and 324, P.P.C. and separate sentences have been awarded. The trial Court was clearly in error in giving two separate convictions and sentences for injuries given to Hussain Bux. Under the law, in these circumstances, the appellant could have been convicted only under Section 326, P.P.C. and given one sentence and not two convictions and two sentences under Section 71, P.P.C. and the illustrations to this section leave no room for doubt on this point. **1981 P Cr. L J 812.**

Same acts constituting different offences : The same series of acts may constitute different offences. An accused cannot be punished at the same time for committing an offence by fire with intent to destroy a warehouse (Sec. 436) and for the offences of mischief. (Sec. 425). Where a mother abandoned her child, with the intention of wholly abandoning it, and knowing that such abandonment was likely to cause its death, and the child died in consequence of the abandonment, it was *held that* she could not be convicted and sentenced under Section 304 and also under Section 317 but under Section 304 only. A person cannot be punished for rioting and also for being a member of an unlawful assembly; for rioting and for wrongful confinement, when the common object of the unlawful assembly is wrongful confinement; for culpable homicide and for being a member of an unlawful assembly armed with a deadly weapon, **7 W R 13**, for dishonestly receiving stolen property (Sec. 411) and for assisting in the concealment of stolen property (Sec. 414), **4 M H C (Appxe) 13** for abducting a child with intent dishonestly to take movable property and also for the theft of a part of the movable property, which he intended dishonestly to take through means of the abduction. **7 M H C 375.**

Sentence in case of conviction of accused in several offences at one trial : Person who was convicted under Sections 302 & 307, P.P.C. for murdering one and making murderous assault on the other was sentenced to imprisonment for life, i.e., 25 years' rigorous imprisonment for murder and 7 years' rigorous imprisonment for murderous assault. Such person who was sentenced for two counts, by virtue of proviso (a) to Section 35 of Criminal Procedure Code, 1898 aggregate sentence could not be ordered beyond imprisonment for life which meant that sentence which he had to undergo should not be beyond 25 years as he in same trial could not be sentenced for a longer period than imprisonment for life. **1997 PCr.LJ 2020.**

Grievous injuries with sharp-edged weapon which could have easily resulted in death : Where the accused inflicted serious injuries with a *Kulhari* on the victim's head, which could have easily resulted in her death, and the accused was convicted both under Sections 307 and 326, P.P.C., and awarded separate sentences under the two offences : *Held*, that the accused could only be convicted either under Section 326, P.P.C. or under Section 307, P.P.C., but as serious injuries were caused on the head which could easily lead to death, it could be safely presumed that the accused had attempted to murder and conviction under Section 307, P.P.C., only was upheld and that under Section 326, P.P.C. set aside. **P L D 1958 B J 5.**

Same acts constituting offences under two different statutes : In a case in which the same acts constitute offences under two different statutes or the same acts constitute offences falling within two or more separate definitions of law, the person so accused cannot be made to suffer separate sentences for each of the said offences, although he may be convicted for the same. The imposition of two separate sentences in such cases even though they may have been made to run concurrently is illegal. **P L D 1959 Dacca 931.**

72. Punishment of person guilty of one of several offences, the judgment stating that it is doubtful of which : In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided if the same punishment is not provided for all.

COMMENTS

Scope : The section applies where the law applicable to a certain set of facts is doubtful. The doubt must be as to which of the offences the accused has committed, not whether he has committed any. If the doubt is on a matter of fact, the accused must be acquitted. **8 Bom. I R 855.**

For a charge for offence falling under this section, reference may be made to Section 236, Criminal Procedure Code, which prescribes the procedure for charging the accused in the alternative. Section 367, sub-section (3) of the same Code enables the Court to pass a judgment in the alternative.

73. Solitary confinement : Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say--

a time not exceeding one month if the term of imprisonment shall not exceed six months;

a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year;

a time not exceeding three months if the term of imprisonment shall exceed one year.

COMMENTS

Principle and Scope : Solitary confinement with or without labour as entirely secludes the prisoner both from sight of, and communication with, other prisoner. This section gives the scales according to which solitary confinement may be inflicted. Under this section solitary confinement can only be inflicted where the Court has power to sentence an offender to rigorous imprisonment.

Solitary confinement amounts to keeping the prisoner thoroughly isolated from any kind of intercourse with the outside world. It is inflicted in order that a feeling of loneliness may produce wholesome influence and reform the criminal. It can be awarded by way of punishment on conviction and not during inquiry and before judgment is pronounced. **P L D 1974 Lah. 120.**

Solitary confinement is a serious deprivation. Blindfolding, confinement in a dark unhealthy underground cellar, refusal of allow talk with anybody or to see relatives, etc., may amount to torture, at least mental if not physical. Solitary confinement is prohibited unless inflicted by way of punishment in accordance with law.

Offence for which under this Code the Court has power to sentence him to rigorous imprisonment : A sentence of solitary confinement can be inflicted only for offences under the Penal Code. It cannot be awarded for offences under special or local Acts. **A I R 1924 Lah. 667.**

Any portion : The words "any portion" imply that the solitary confinement if inflicted for the whole term of imprisonment is illegal. **Z Beng. L R 49.**

In the case of simultaneous convictions, the awards of separate terms for imprisonment, which in the aggregate exceed three months, is legal, but as a matter of practice, a sentence of more than three months' solitary confinement is not passed on a person convicted at one trial of more offences than one. **7 P R 1897.**

'Solitary confinement for imprisonment in lieu of fine' : Solitary confinement cannot be awarded in lieu of fine as part of the imprisonment. As a matter of practice solitary confinement should be imposed in most exceptional cases of unparalleled atrocity or brutality. **26 P R 1873.**

74. Limit of solitary confinement : In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the period of solitary confinement of not less duration than such periods, and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

75 Enhanced punishment for certain offenders under Chapter XII or Chapter XVII after previous conviction : Whoever, having been convicted--

- (a) by a Court in Pakistan of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, or
- (b) *[Omitted by the Federal Laws (Revision and Declaration), Ordinance, XXVII of 1981],*

shall be guilty of any offence punishable under either of those Chapters with the imprisonment for the like term, shall be subject for every such subsequent offence to imprisonment for life, or to imprisonment of either description for a term which may extend to ten years.

COMMENTS

Object : The object of this section is to provide for an additional sentence, not for a less severe sentence on a second conviction. Recourse should not be had to it if the punishment provided for the offence is itself sufficient. **A I R 1943 Cal. 25.** The section only enables a Court to pass a sentence commensurate with the gravity of the offence. **A I R 1920 Pat. 526.**

Scope : This section applies to cases in which it is intended to pass sentences more severe than those provided in the Code for the particular offence charged. But that does not involve a complete exclusion from consideration of previous convictions in cases where it is not intended or possible to exceed the limits fixed by the Code. **(1928) 6 Rang. 391.**

Mere admission of accused without proof of prosecution evidence of previous conviction is not enough : Where provision of Section 511, Cr.P.C., had not been complied with and there was not a word in the prosecution evidence about the previous conviction of the accused, who had been only put a question regarding his previous conviction in the course of his examination under Section 342, Cr.P.C., which question he had answered in the affirmative. The enhanced sentence in terms of Section 75, P.P.C., was not in accordance with law. Section 511 of the Code of Criminal Procedure requires that evidence of previous conviction should be adduced by the production of one of the certificates or documents mentioned in clauses (a) and (b) of that section, through the hands of a witness. This procedure was not observed in this case. Unless some evidence is tendered by the prosecution to indicate that

the accused has a previous conviction against him which renders him liable to enhanced punishment no occasion in law can arise to put a question in respect of it to the accused. It is only the appearance of something in the prosecution evidence which can give an occasion to the Court to put questions to the accused at the time of his examination under Section 342, Cr.P.C., it is not correct to invoke the aid of Section 75, P.P.C., for imposing enhanced punishment if that section is added to the charge without compliance with the requirements of Section 511, Cr.P.C., even admission of previous conviction by the accused is not sufficient, if previous conviction has not been deposed to by any of the prosecution witnesses and one of the certificates or documents mentioned in Section 511, Cr.P.C., has not been produced. **P L D 1959 Pesh. 6.**

Previous conviction : The previous conviction can be proved by admission of fact by the accused. Sentence under Section 75 may be based on such admission. **P L D 1961 Dacca 307.** It has been held that Section 75 cannot be made applicable to a mere attempt to commit the offence. **1968 P Cr. L J 1857.**

The accused's admission of previous convictions dispenses with necessity of independent proof of same under Section 511, Cr.P.C. **P L D 1958 Lah. 421.**

Charge mentioned only one previous conviction but Court while assessing quantum of sentence taking into consideration eleven previous convictions. Sentence was reduced on appeal by the High Court. **P L D 1960 Lah. 416.**

Enhanced punishment after previous conviction : Previous conviction of an accused in cases of similar kind can be taken into consideration for imposing enhanced punishment under the provisions of Section 75, P.P.C. and in this connection either copies of judgments previously convicting the accused or a list of the same can be produced in evidence. **1995 P Cr. L J 140.**

The Lahore High Court lays down the following procedure when a previous conviction is to be proved. When it is proposed to charge an accused person with previous convictions under this section, no evidence on the point should be led before the charge is framed. The accused should not be questioned about his previous convictions when examined under Section 342, as clearly that is only for the purpose of enabling him to explain matters appearing in evidence against him and his previous convictions should not have appeared in evidence against him at this stage. When, however, the Magistrate considers it fit to frame a charge under Section 254 in respect of the substantive offence, he should then have recourse to Section 221(7) and in that charge should include the previous convictions. He should then ask the accused to plead to that charge making it clear to him that he is pleading to the previous convictions distinctly from the original offence. Then comes Section 225-A and under that section if the accused admits his previous conviction or convictions, they do not have to be proved separately and the Magistrate can take them into consideration in convicting and sentencing him for the main offence. If, however, the accused does not admit his previous convictions, the Magistrate has to proceed to judgment of the substantive charge and if that is a judgment of conviction, he is then to take evidence according to law, i.e., under Section 511 of the Code as to the previous convictions and then come to a separate finding upon them after which he will pass the proper sentence under the substantive section read with this section. **A I R 1943 Lah. 477.**

Enhanced punishment : Accused from whom heroin weighing 16 grams was recovered was tried for offence and Trial Court convicted and sentenced him under Art. 4 as well as under Art. 24 of the Order being a previous convict. List of cases which previously were instituted against accused in which he was convicted and sentenced, was produced by prosecution in evidence. Accused in his deposition under Section 342, Cr.P.C. was asked question about his previous conviction and his reply was in affirmative. Accused also made a deposition on oath wherein he admitted that he was convicted and fined in 19 cases previously and most of them were of similar kind. Previous conviction of an accused in cases of similar kind could be taken into consideration under Section 75, P.P.C. and in that connection either

copies of judgments whereby accused was previously convicted and sentenced could be produced in evidence or a list of same could be produced. Such procedure having been adopted in the case, non-disclosure of previous conviction of accused in charge-sheet, was not such an illegality or irregularity which could have caused any serious prejudice to accused especially when he himself had admitted his previous conviction. Enhanced punishment on ground of previous conviction, was rightly awarded to accused, in circumstances. **1996 PCr.LJ 1218.**

Enhanced punishment due to previous conviction--Validity : List of cases in which the accused had been previously convicted and sentenced for similar offences had been produced in evidence in the Trial Court. Accused in his deposition under Section 342, Cr.P.C. as well as on oath had also admitted his previous convictions. Non-mention of previous conviction of the accused in the charge-sheet was not such an illegality or irregularity so as to cause any serious prejudice to him in defending himself as he had been asked such question in both of his aforesaid depositions where he had admitted his previous convictions. Convictions and sentences awarded to accused were upheld in circumstances. **1995 P Cr. L J 140.**

Three conditions : To bring an offence within the terms of the section three conditions must be fulfilled :--

- (1) The offence must be one under either Chapter XII or XVII of the Code.
- (2) The previous conviction must have been for an offence therein punishable with imprisonment for not less than three years.
- (3) The subsequent offence must also be punishable with imprisonment for not less than three years.

It is not necessary that the previous or subsequent sentence should not be less than three years. What the section requires is that the offence committed by the accused should be punishable with imprisonment extending to three years or more and not that he would have been punished to that term.

'Subsequent offence' : These words mean an offence committed subsequently to the previous conviction. A person is not liable to enhanced punishment under this section unless the subsequent conviction is for an offence committed after the previous conviction. **P L D 1961 Dacca 307.**

Previous conviction in foreign territory : A previous conviction of an accused person in foreign territory cannot be proved against him under this section. **17 P R 1913.** A State, the Courts of which are not under the authority of the Federal or Provincial Government, is a foreign territory. **21 Cr. L J 144.**

Attempt : This section does not apply to cases of attempts not specially made offences in Chapters XII and XVII of the Code, nor to cases of offences which fall under Section 511 of the Code.

Abetment : The previous conviction of an accused for an offence under Chapters XII and XVII cannot be taken into consideration at a subsequent conviction for abetment of an offence under those Chapters for the purpose of enhancing punishment under this section. **10 Bom. L R 26.**

CHAPTER IV

GENERAL EXCEPTIONS

This Chapter deals with exceptions to criminal liability in general, i.e., such as are of general application to the cases envisaged. According to Article 121 of Qanun-e-Shahadat, 1984 when a person is accused of any offence the Court shall presume that his case is not covered by any of those exceptions. If the accused takes shelter behind any of these circumstances the burden will lie upon him to prove such exceptional circumstances operating in his favour. These exceptions it may be noted are not exhaustive. There are many other special exceptions and provisos of sections which also deal with exceptions to liability. The exceptions dealt with in this Chapter are detailed below :--

- (1) Act of a person bound by law to do a certain thing. (S. 76).
- (2) Act of a Judge acting judicially. (S. 77).
- (3) Act done pursuant to an order or judgment of a Court. (S. 78).
- (4) Act of a person justified or believing himself justified, by law. (S. 79).
- (5) Accident in doing a lawful act. (S. 80).
- (6) Act likely to cause harm done without criminal intent to prevent other harm. (S. 81).
- (7) Act of a child under 7 years. (S. 82).
- (8) Act of a child above 7 and under 12 years, but of immature understanding. (S. 83).
- (9) Act of a person of unsound mind. (S. 84).
- (10) Act of an intoxicated person. (S. 85).
- (11) Act not known to be likely to cause death or grievous hurt done by consent of the sufferer. (S. 87).
- (12) Act not intended to cause death done by consent of sufferer. (S. 88).
- (13) Act done in good faith for the benefit of a child or an insane person by or by the consent of guardian. (S. 89).
- (14) Act done in good faith for the benefit of a person without consent. (S. 92).
- (15) Communication made in good faith to a person for his benefit. (S. 93).
- (16) Act done under threat of death. (S. 94).
- (17) Act causing slight harm. (S. 95).
- (18) Act done in private defence. (Ss. 96-106).

Burden of proof : The burden cast on the accused under Article 121 of Qanun-e-Shahadat, 1984 cannot be as heavy as the burden that rests on the prosecution. The plea of the accused may not be established and yet it may create a reasonable doubt in regard to his guilt. It cannot be said that because under Article 121 of Qanun-e-Shahadat, 1984, the burden of proving is on the accused and he has not discharged that burden, but has only raised a reasonable doubt, the Court has to convict him in spite of the existence of such a doubt. The case is to be decided on the entire evidence and not on the special pleading. **P L D 1953 F C 93.**

While the Court shall presume the absence of circumstances bringing the case within any of the Exceptions, there will be cases in which the accused may not have succeeded in affirmatively proving the existence of those circumstances, and yet on examining the prosecution case side by side with the defence a reasonable doubt might be created in the

mind of the Judge regarding the guilt to the accused. The benefit of it will go to the accused whether as a matter of right or of prudence, for the burden to prove all the ingredients of a crime remains on the prosecution from the beginning to the end. **P L D 1957 Lah. 31.**

In another case the Supreme Court of Pakistan has *held that* subject to certain exceptions, the most important of which is to be found in Article 121 of Qanun-e-Shahadat, 1984, the admitted and otherwise firmly established principle being that before the prosecution can ask for a conviction of a criminal offence, it is its duty to prove each ingredient of the offence beyond a reasonable doubt. **P L D 1956 S C (Pak.) 417.**

76. Act done by a person bound, or by mistake of fact believing himself bound, by law : Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not reason of a mistake of law in good faith believes himself to be, bound by law to do it.

Illustrations

(a) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.

(b) A, an officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due enquiry, believing Z to be Y, arrests Z. A has committed no offence.

COMMENTS

This section excuses a person who has committed an offence, under a misconception of facts, which led him to believe in good faith that he was committed by law to do it. An Act done by mistake of fact is good faith and not by reason of a mistake of law has been given exemption from penal action. The maxim "*ignorantia facit excusat*", "*ignorantia juris non-excusat*" is the basis of this section. It means ignorance of fact excuses; ignorance of law does not excuse. The principle enunciated in this section admits of no exception.

To bring within the immunity, it has to be proved that :-

- (1) The person was either bound by law to do that act.
- (2) By mistake of fact and not by mistake of law, he is good faith, believed himself to be bound by law to do that act.

Mistake of Fact : Mistake is a slip made out by chance and not by design. Mistake may be said to be some unintentional act, omission or error arising from ignorance, forgetfulness or misplaced confidence. It is an erroneous mental condition caused by misunderstanding of truth and while acting on it a wrongful act is committed.

Mistake of fact is a good defence although mistake of law is not accepted as defence. Mistake of law ordinarily means as to the existence or otherwise of any law on a relevant subject as well as mistake as to what the law is.

To entitle a person to claim the benefit of this section, it is necessary to show the existence of a state of facts which would justify the belief in good faith, interpreting the latter expression with reference to Section 52.....that the person to whom the order, was given was bound by law to obey it. Thus in the case of a soldier, the Penal Code, does not recognize the mere duty of blind obedience to the commands of a superior as sufficient to protect him from the penal consequences of his act. In certain cases, however, a soldier receives protection under Section 132 of the Criminal Procedure Code.

'Believe to be bound by law' : This section provides that act done by a person who believes himself to be bound by law to do it commits no offence if it is done by mistake of fact. It may be added that the exception has been given to the act done by mistake of fact and not

to the act done by mistake of law. As such a person who is not actually bound by law to do certain act but he believes to be so bound and that bondage he holds in good faith under a mistake of fact; he is entitled to the protection granted by this section.

Obedience to an illegal order can only be used in mitigation of punishment, but cannot be used as a complete defence. **P L D 1959 Lah. 541.**

A constable was placed on duty for the express purpose of preventing the stolen property from being carried away and on seeing the complainant on an early morning carrying away three pieces of cloth under his arm, he arrested him, suspecting the cloth as stolen property. Later the Inspector of Police released him, and thereafter he prosecuted him for wrongful confinement. It was *held* that the constable acted under a *bona fide* belief and was entitled to acquittal. **I L R 12 Bom. 377.**

Even when a soldier obeys the order of a superior officer, if the order is obviously improper or illegal, the soldier is not excused even though he may be put in the awkward predicament of choosing whether he will risk being shot by the orders of a Court Martial for not obeying the orders or being hanged by the Criminal Court for murder, for obeying the order of the superior officer. **A I R 1940 Lah. 210.**

77. Act of Judge when acting judicially : Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

COMMENTS

Scope : This and the next section protect judicial officers and their ministerial officers from criminal process just as the 'Judicial Officers' Protection Act protects them from civil liability.

Two ingredients must be brought out by a person who acts as Judge while acting judicially to avail the protection provided by this section. These are :

- (1) When the act is done in exercise of powers given by law.
- (2) When the act is done in good faith to be in exercise of such powers.

Under this section a Judge is exempted not only in those cases in which he proceeds irregularly in the exercise of a power which the law gives to him, but also in cases where he, in good faith, exceeds his jurisdiction and has no lawful power.

78. Act done pursuant to the judgment or order of Court : Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

COMMENTS

Object : This section affords protection to officers acting under the authority of a judgment or order of a Court of justice. It differs from Section 77 on the question of jurisdiction. Here, the officer is protected in carrying out an order of a Court which may have no jurisdiction at all, if he believed that the Court had jurisdiction; whereas under Section 77 the Judge must be acting within his jurisdiction to be protected by it.

The difference between this section and the last previous section is of jurisdiction. It lays down that nothing is an offence which is done in pursuance of the judgment or order of a Court of justice even if the Court had no jurisdiction to pass that order which the person carried out. The judgments and orders of the Courts, in other words, can be acted upon provided the act is done in good faith believing that the Court had jurisdiction.

Mistake of law can be pleaded as a defence under this section.

79. Act done by a person justified, or by mistake of fact believing himself justified, by law : Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

Illustration

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment, exerted in good faith of the power which the law gives to all persons of apprehending murders in the act, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

COMMENTS

Scope : This section deals with cases in which a person acts in the belief that he is justified by law to do act. This section is not exhaustive. These are cases in which intention and knowledge are ingredients of the offence and have to be established either by evidence or legal inference which do not necessarily come within the ambit of this section. **A I R 1943 Lah. 208.**

'Mistake of Fact' : 'Mistake' is not mere forgetfulness. (1891) 1 Q B 417. It is a slip "made, not by design, but by mistake". (1894) 65 L J Q B 73. Honest and reasonable mistake stands in fact on the same footing as absence of a reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. (1889) 23 Q B D 168.

'Mistake of Law' : Mistake in point of law in a criminal case is no defence. Mistake of law ordinarily means mistake as to the existence or otherwise of any law on a relevant subject as well as mistake as to what the law is. **A I R 1950 Cutt. 75.**

The Penal Code does not exempt an act done under a mistake of law from the operation of the Penal Law. Mistake of law is no defence even if committed in good faith. **P L D 1962 Lah. 558.**

A person is entitled to cut off those portions of the tree growing on his neighbour's land which overhang his land. As he is justified by law in doing such an act it does not, by virtue of this section amount to an offence of mischief punishable under Section 42. **P L D 1958 Lah. 747.**

It is well settled that obedience to an unlawful order does not exonerate or excuse a person who commits an offence as a consequence of such order. If the commands are obviously illegal an inferior would be justified in refusing to execute such commands. **P L D 1970 Kar. 261.**

Whenever the question of justification of an offence either due to mistake of fact or mistake of law arise, the guiding rules are : (1) that when an act is in itself plainly criminal, and is more severely punishable if certain circumstances co-exist, ignorance of the existence of such circumstances is no answer to a charge for the aggravated offence. (2) That where an act is *prima facie* innocent and proper, unless certain circumstances co-exist, then ignorances of such circumstances is an answer to the charge. (3) That the state of the defendant's mind must amount to absolute ignorance of the existence of the circumstances which alters the character to the act, or to a belief in its non-existence. (4) Where an act which is in itself wrong is, under certain circumstances criminal, person who does the wrong act cannot set up as a defence that he was ignorant of the facts which turned the wrong into a crime. (5) Where statute makes it penal to do an act under certain circumstances, it is a question, upon the

wording and object of the particular statute, whether the responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case his knowledge is immaterial.

Act of State : As act of State is an act injurious to the person or to the property of some person who is not at the time of that act a subject of the Government, which act is done by any representative of the Government's authority, civil or military, and is either previous sanctioned or subsequently ratified by the Government. The doctrine as to the acts of State can apply only to acts which affect foreigner and which are done by the orders or with the ratification of the Government. As between the State and its subjects there can be no such thing as an act of State. Court of Law are established for the express purpose of limiting the public authority in its conduct towards individuals.

It is well settled that obedience to an unlawful order does not exonerate or excuse a person who commits an offence as a consequence of such order. If the commands are obviously illegal an inferior would be justified in refusing to execute such command. **P L D 1970 Kar. 261.**

Liability of private persons : Private persons acting under Sections 43, 59, 77 and 78 of the Criminal Procedure Code will be protected under this section.

80. Accident in doing a lawful act : Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Illustration

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here if there was no want of proper caution on the part of A, his act is excusable and not an offence.

COMMENTS

Scope : This section exempts the doer of an innocent or lawful act in an innocent or lawful manner and without any criminal intention or knowledge from any unforeseen evil result that may ensue from accident or misfortune. The essence of the exemption is the complete absence of criminal intention or knowledge.

'Accident' : An effect is said to be accident when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it. The effect is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought under the circumstances in which it is done, to take reasonable precautions against it. An injury is said to be accidental when it is neither wilfully nor negligently caused. Again where two players engaged themselves in a dual and while the bout was going on one of the wrestlers was thrown by the other with the result that his head was hit by a stone and a fracture in the skull was caused which resulted in his death. It was held that the injury was caused accidentally and without any criminal intention as there was no proof of any foulplay and as such accused could not be held guilty. There was an implied consent on the part of each to suffer accidental injury. An accident is something that happens out of the ordinary cause of things. **1968 L R 3 C P 313.**

Deceased had been accidentally hit by the fire of accused's rifle which fell down due to jerk caused by the start of the vehicle all of a sudden. No element of criminal intention or mistake of act was found on the part of the accused and he was protected under Section 80, P.P.C. Defence version when kept in juxtaposition with the prosecution story appeared to be more probable. Accused was acquitted on benefit of doubt in circumstances. **1996 M L D 919.**

A big party went for shooting pigs. A bear rushed towards the accused who fired at it but he missed the bear and the shot hit the leg of member of the party. It was held that the case was of an accident but not one of rash or negligent shooting and the accused was acquitted. **A I R 1927 Lah. 889.**

Burden of proof : According to this section nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner by lawful means and which proper care and caution. The burden of proving all the conditions mentioned above is on the accused who wishes to bring his case within the purview of this section. **P L D 1953 Lah. 34.**

81. Act likely to cause harm, but done without criminal intent, and to prevent other harm : Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation : It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

Illustrations

(a) A, the captain of a steam vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B, with twenty or thirty passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only two passengers on board, which he may possibly clear. Here, if A alters his course without any intention to run down the boat C and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him incurring the risk of running down C.

(b) A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

COMMENTS

In order to attract this section it should be shown that the Act complained of was done, in good faith in order to prevent or avoid harm to the person or property of another.

An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose and that the evil inflicted by it was not disproportionate to the evil avoided.

Without any criminal intention : Under no circumstances can a person be justified in intentionally causing harm; but if he causes the harm without any criminal intention, and merely with the knowledge that it is likely to ensue, he will not be held responsible for the result of his act, provided it be done in good faith to avoid or prevent other harm to person or property.

Accused party for immediate necessity to prevent their houses from imminent danger of being washed away or getting submerged by rain water erecting a *banna*. Complainant party trying to demolish such *banna* attacked by accused party causing two deaths and injuries to others. Accused party not found to have caused more harm than necessary and reasonable. The accused's action was protected under Section 81 and they were, therefore not liable for offences of murder, attempt to murder and causing grievous injuries. **P L D 1979 Lah. 711 (2).**

It is one of the doctrines of Criminal Jurisprudence that no crime is committed unless it is with a criminal intention, in other words action is not an offence if the mind of the person committing the act is innocent. An act is intentional if it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied, the criminal intention in the fact because of the desire by which it is accompanied. Criminal intention which means the purpose or design of doing an act forbidden by the Criminal Law without just cause or excuse is different from motive for that act. **34 Cr. L J 1055.** By a motive is meant anything that can contribute to give birth to, or even to prevent, any kind of action. Motive may serve as a clue to the intention; but although the motive be pure, the act done under it may be criminal. Purity of motive will not purge an Act of its criminal character.

The Penal Code does not make *mens rea* an essential ingredient of every offence created by it, as there are various sections which define of offences which do not make criminal intention an essential element of the offence and use words like knowledge, voluntariness, dishonest or fraud, etc., to indicate the state of mind giving birth to the offence.

The following kinds of offences are held to be offences wherein criminal intention is not an essential ingredient :--

- (1) cases not criminal in any real sense but which in the public interest are prohibited under a penalty;
- (2) public nuisances; and
- (3) cases criminal in form but which are really only a summary mode of enforcing a civil right.

Every ingredient of the offence is stated in the definitions.

'Preventing.....harm to person or property' : This is the case in which evil is done to prevent a greater evil. It is to this ground of justification that we must refer the extreme measure which may become necessary on occasions of contagious diseases, sieges, famines, tempests, or shipwrecks. It is a question of fact in each case whether the harm to be avoided was of such a nature as to justify the doing of the Act with the knowledge that the act would cause harm.

A military sentry was placed near a fire to guard the property. A Head Constable, not in uniform, came to the fire and wished to force his way past the military sentry, who not knowing who he was, kicked him. It was *held* that the sentry was protected under this section as he acted to prevent greater harm. **I L R 17 Bom. 626.**

82. Act of a child under seven years of age : Nothing is an offence which is done by a child under seven years of age.

COMMENTS

Under the age of seven years no infant can be guilty of a crime; for, under that age an infant is by presumption of law, *doli incapax*, and cannot be endowed with any discretion. **Hale P C 27.** If the accused were a child under seven years of age, the proof of that fact would *ipso facto* an answer to the prosecution. **22 W R 27 (Cr.).**

Though a child below 7 years of age is incapable of committing an offence, an adult may employ the child as an agent to commit a crime. In such a case the adult will be liable as an abettor. **Section 108, Expl. 3, illus. (a) & (b).**

The accused purchased two pieces of cloth for Six Paise, from a child aged six years, valued at 95 Paise, which the child had taken from the house of a third person. It was *held that*, assuming that a charge of an offence of dishonest reception of property (Sec. 411) could not be sustained owing to the incapacity of the child to commit an offence, the accused was guilty of criminal misappropriation if he knew that the property belonged to the child's guardians and dishonestly appropriated it to his own use. (1886) 1 Weir 470.

83. Act of a child above seven and under twelve of immature understanding : Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

COMMENTS

Scope : This section deals with children above the age of seven years, but less than the age of twelve years and qualifies their exemption with condition that they would be exempted if they have not attained sufficient maturity of understanding to judge of the nature and consequences of their conduct at the time when they committed the crime, because if the child of this age has attained the maturity of understanding of an adult person, then the legal presumption that a person intends the natural consequences of his action would arise against him.

Where the accused, a boy over eleven years, but below twelve years of age, picked up his knife and advanced towards the deceased with a threatening gesture, saying that he would cut him to bits, and did actually cut him, his entire action can only lead to one inference, namely that he did what he intended to do and that he knew all the time that blow inflicted with a *kathi* (knife) would effectuate his intention. **A I R 1950 Butt. 292.**

It is not necessary for the prosecution to lead positive evidence to show that an accused person below twelve years of age had arrived at sufficient maturity of understanding within the meaning of Section 83 of the Penal Code. It would be permissible to arrive at that finding even on a consideration of the circumstances of the case. **P L D 1949 Lah. 372.**

✓ **84. Act of a person of unsound mind :** Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

COMMENTS

Insanity--History traced : The concept of degree of criminal responsibility of a person whose mind is deranged or deceased or unbalanced has undergone progressive and far-reaching changes during the last 100 years or so. This is due to the fact, as pointed out by Harry Elmer Barnes and N.K. Teeters in 'New Horizons in Criminology' (3rd Edition) that there is probably nothing more confusing in the realm of jurisprudence than the degree moral responsibility of the offender, especially with the more repugnant of crimes such as murder, rape, or wanton violence". In the Eighteenth Century, even the Humanitarian Classical School of Penology did not excuse the lunatic from his acts. This view was subsequently modified by the jurists of the Neo-Classical School, who contended that this adult insane criminal was not liable for his crime and eventually Courts came to recognize that if a person was suffering from some obvious and serious mental disorder, an essential element in the commission of a crime was lacking, namely, sense of responsibility. This view, in fact, was based on the doctrine of *mens rea*, which is now considered to be almost indispensable element of every crime, except when the statute may expressly provide otherwise. In the Eighteenth Century England, the

Courts adopted what is known as the "Wild Beast, lest, according to which if a person was to be exempted from punishment it had to be shown that he was totally deprived of his understanding and memory and knew no more than an infant, a brute or a wild beast. Later the "delusion" test was evolved which was applied in the famous case of James Hadfield who was tried for attempting to take the life of George III. The law on the subject, however, was crystallized in the *M' Naghten* case, in which the House of Lords enunciated the famous M'Naghten Rules which postulate that a person is punishable, according to the nature of the crime committed, if he knew at the time of such crime that he was acting contrary to law of the land and that every man is presumed to be sane until the contrary is proved. Furthermore, the said rules postulated that to establish a defence on the ground of insanity it must be proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of mind, as not to know the nature and the quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong. The psychiatrists have taken strong exception to these rules which according to them are based on an extremely narrow conception of the nature of insanity. Some of the American Courts took the view that insanity was proved if the accused has no power of control or his moral or intellectual powers were so deficient that he had no sufficient will or if he did the act for an irresistible and uncontrolled impulse. Out of this arose the 'irresistible test', which has been adopted by a number of States in the U.S.A. Some of the States in U.S.A. adhere to the "right and wrong test" while others follow the "knowledge of nature" and "equality test". The M'Naghten Rules have been departed from and replaced in the District of Columbia by the Durham Rules, which postulates that an accused is not criminally responsible if his unlawful act was a product of a mental disease or mental defect. What is known as the Briggs Law of Massachusetts, passed in 1921, provides that when a person is indicted by a grand Jury for a capital offence or is indicted and is known to have been indicted for any other offence more than once in the past, or to have been previously convicted of a felony the department of mental diseases is to examine the person concerned to determine his mental condition and the existence of any mental disorder that would affect his criminal responsibility. Finally, it was the Islamic Law, as has been admitted by John Brugge in his "The Guilty Mind : Psychiatry and the Law of Homicide", that made the first clear distinction between homicide by the mentally sound and by the deranged person which took Europe several centuries to evolve.

In Pakistan, the law with regard to defence on the plea of insanity is contained in Section 84, P.P.C. The Supreme Court also in *Muhammad Shafi v. The State*, **P L D 1962 S C 472**, had occasion to consider the scope and field of application of Section 84, P.P.C. and held that unfortunately the law in this country does not recognise such lesser forms of mental abnormality and, apart from unsoundness of mind which renders a person incapable of knowing either the nature of the act or that what he is doing is wrong or contrary to law, the plea of a diminished responsibility is not available as a defence in a criminal prosecution as under the English Act. Under the existing law even in a case of impulsive insanity or mania it is necessary to establish that maniac was incapable of knowing what he was doing at that point of time. **1975 P Cr. L J 910.**

This section is based on the maxim "*furiosus furor solum puniatur*" which means that a mad man is punished by his madness.

This section protects the acts done by persons of unsound mind. It requires that the doer must be incapable of knowing the nature of the act and such incapability must have existed and influenced at the time of doing that act. Further it must also have been due to unsoundness of mind and not due to other score. It has also to be shown that the person doing the act was incapable of knowing the nature of the act or that what he was either doing was wrong or contrary to law.

To bring a case under this section it is necessary to prove--

- (1) that at the time of committing the offence,
- (2) the accused was labouring under a defect of reason,

- (3) which has been caused by unsoundness of mind,
- (4) such as had rendered him--
 - (a) incapable of knowing the nature of the act, or
 - (b) that he was doing what was either wrong or contrary to law.

Evidence of premeditation or design or evidence that accused after commission of offence tried to resist arrest or ran away negatives plea of insanity. **P L D 1976 Lah. 805.**

Mens rea is a condition precedent in Islam to constitute a criminal liability. Person who is insane or incapable of distinguishing between right or wrong on account of impairment of his mental faculties cannot be held responsible for the criminal act. **1995 M L D 667.**

Trial of a lunatic person--Procedure detailed : Where the prosecution evidence *prima facie* showed that the accused at the time of commission of offence was not of sound mind and the Courts were only conscious of the fact that the accused appeared to be of sound mind at the trial, the approach of the Courts was not correct. Courts should have made an inquiry into the fact of unsoundness of the mind of accused at the time of commission of the offence to determine whether the accused could be convicted of the offence he was charged of. Supreme Court remanded the case to the Trial Court to be decided in accordance with law. **1994 S C M R 1517.**

At the time of doing it : It must clearly be proved that at the time of committing of the act the accused was labouring under such a defect of reason, from disease of the mind, as to know the nature and quality of the act, he was doing or, if he did know it, that he did not know he was doing what was wrong. If he did know it, he was responsible. A plea of insanity at the time of trial will not avail the accused. **56 P R 1866.** In point of time and as a matter of law the question of the insanity of an accused person at the time of the occurrence and at the time of the inquiry or trial are independent matters to be adjudged separately, although each may be relevant to the other in formulating conclusion as to state of his mind. **P L D 1960 Lah. 111.**

Crucial point of time at which unsoundness of mind to be established is time when act constituting offence is committed. Burden of proving entitlement to benefit of exemption lies on the accused. **1974 S C M R 214.**

Protection where not available : Protection under section 84, P.P.C. is not available where accused is capable of knowing the nature of his acts or that what he is doing is either wrong or contrary to law. **1998 S C M R 1582.**

Insanity brought on by drunkenness : Drunkenness is no excuse, but *delirium tremens* caused by drinking and differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility. If habitual drunkenness has created fixed insanity, whether permanent or intermittent, it is the same as if insanity had been produced by any other cause, and the act is excused. **I L R 29 Cal. 493.**

Accused admitting himself to be a drug addict. The case *held*, could not come within terms of Section 85. **1975 S C M R 295.**

Nature of the act or what is either wrong or contrary to law : If the accused were conscious that the act was done which he ought not to do, and if the act was at the same time contrary to the law of the land, he is punishable. His liability will not be diminished if he did the act complained of with a view, under the influence of insane delusion, of redressing or of revenging some supposed grievance of injury, or of producing some public benefit, if he knew that he was acting contrary to law. **P L D 1960 Lah. 111.** The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently clear to apprehend what he is doing, he must always be presumed to intend the consequences of the action he takes. **P L D 1956 Kar. 579.**

If the accused was conscious that the act was done which he ought not to do, and if the act was at the same time contrary to municipal law, he is punishable. Defence has to prove that accused was labouring under such a defect of reason as not to know the nature of act, he was doing or what he was doing wrong. The mere fact that on an earlier occasion the appellant had been subject to delusion or had suffered from derangement of the mind should not be sufficient to bring the case within the exemption. The Court is only concerned with the state of mind of an accused at the time of the act. Even a plea of insanity at the time of trial would not help him, though he may be tried in accordance with the special procedure laid down in the Code of Criminal Procedure. The appellant behaved in a normal fashion before the Court at the time of hearing of the case. In the circumstances, the accused behaving normally and making a coherent statement, he was deemed to be held responsible for his act and the protection under Section 84 was denied to him. **1977 P Cr. L J 977.**

Insane delusion : Where it was proved that the accused had committed multiple murders while suffering from mental derangement of some sort and it was found that there was:

- (i) absence of any motive,
- (ii) absence of security,
- (iii) want of pre-arrangement, and
- (iv) want of accomplices, it was *held* that the circumstances were, insufficient to support the inference that the accused suffered from unsoundness of mind of the kind referred to in this section.

Law recognizes only those mental abnormalities as a defence plea which render a person incapable of knowing either the nature of the act or that what he is doing is no wrong and contrary to law. **1995 M L D 667.**

Benefit of general exception of Section 84, was pressed in service on grounds of accused (i) having no motive for murdering deceased; (ii) and being afflicted with insanity. There was nothing to prove that at time accused committed murder he was *non compas mentis* but on contrary accused attempted to run away when being apprehended by prosecution witnesses. Circumstances indicated that accused's cognitive faculties were not impaired and accused knew that his act of stabbing deceased was wrong and contrary to law. Conviction and sentence were maintained in circumstances. **P L D 1952 Lah. 502.**

Accused bound to prove his plea of insanity at the time of occurrence. Where protection is claimed under Section 84, P.P.C., on the plea of insanity, burden is on the accused to prove unsoundness of his mind at the time of occurrence. Mere abnormal conduct of accused is not covered by exception contemplated by the said provision. **1998 S C M R 1582.**

Burden of proof : Unsoundness of mind must be affirmatively proved within the meaning of Article 121 of Qanun-e-Shadat 1984, Merely creating doubt as to the existence or otherwise of circumstances bringing the case within the exception is not sufficient. Insanity has to be proved either from the prosecution evidence or independently by the defence. **P L D 1960 Lah. 111.**

85. Act of a person incapable of judgment by reason of intoxication caused against his will : Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

COMMENTS

Scope : This section applies only to involuntary and non-voluntary drunkenness. **A I R 1941 Lah. 454.** Under this section a person will be exonerated from liability for doing an act while in a state of intoxication if he, at the time of doing it, by reason of intoxication, was--

- (1) incapable of knowing the nature of the act, or
- (2) that he was doing what was either wrong or contrary to law:

Provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Voluntary drunkenness is no excuse for the commission of a crime. At the same time drunkenness does not, in the eye of the law, make an offence the more heinous. **16 W R 36 (Cr.).** It is a species of madness for which the mad man is to blame. The law pronounces that the obscuration and divestment of that judgment and human feeling which in a sober state would have prevented the accused from offending, shall not, when produced by his voluntary act, screen him from punishment, although he be no longer capable of 'self-restraint.' Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime ought to be taken into consideration in order to determine whether he had that intent. **I L R 12 Rang. 445.**

Where the accused himself admits that he is a drug addict, such a case would not come within the terms of this section. **1974 S C M R 295.**

Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. **1920 A C 479.**

The accused ravished a girl of thirteen years of age and, in furtherance of the act of rape, placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation. The sole defence was a plea of drunkenness. It was *held that* drunkenness was no defence unless it could be established that the accused at the time of committing rape was so drunk that he was incapable of forming the intent to commit it (which was not alleged), inasmuch as the death resulted from a succession of acts, the rape and the act of violence causing suffocation, which could not be regarded independently of each other; and that the accused was guilty of murder. **1920 A C 479.**

86. Offence requiring a particular intent or knowledge committed by one who is intoxicated : In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

COMMENTS

As certain guilty knowledge of intention forms part of the definition of many offences, this section is provided to meet those cases. It says that a person voluntarily drunk will be deemed to have the same knowledge as he would have had if he had not been intoxicated. There may be cases in which a particular knowledge is an ingredient, and there may be other cases in which a particular intent is an ingredient, the two not being necessarily always identical. The section does not say that the accused shall be liable to be dealt with as if he had the same intention as might have been presumed if he had not been intoxicated. Therefore, although there is a presumption so far as knowledge is concerned, there is no such

presumption with regard to intention. Thus this section attributes to a drunken man the knowledge of a sober man when judging of his action but does not give him the same intention. This knowledge is the result of a legal fiction and constructive intention cannot invariably be raised. **28 P R 1917 (Cr.).**

Unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation. **I L R 7 Lah. 141.**

87. Act not intended and not known to be likely to cause death or grievous hurt, done by consent : Nothing which is not intended to cause death, or grievous hurt, and which is not known by doer to be likely to cause death, or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person, above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which in the course of such fencing, may be caused without foulplay; and if A, while playing fairly, hurts Z, A commits no offence.

COMMENTS

Scope : This section protects those acts from criminal responsibility which are neither intended nor known to the doer to be likely to cause death or grievous hurt, and are done by consent. The consent may be either express or implied.

The maxim "*volenti non fit injuria*" which means that he who consents suffers no injury, is the base on which this section has been included in the Code and this maxim itself is based on the two propositions :--

- (1) That every person is the best Judge of his own interests; and
- (2) That no man will consent to what he intends or thinks harmful to himself.

The section protects a person who causes injury to another person above eighteen years of age who has given his consent by doing an act not intended and not known to be likely to cause death or grievous hurt.

The section does not permit a man to give his consent to anything intended, or known to be likely to cause his own death or grievous hurt.

Ordinary games such as fencing, single sticks, boxing, football, and the like, are protected by this section. The true principle which distinguishes such cases from those where death ensues in consequence of an intent to do a slight injury, is, that here bodily harm is not the motive on either side. But proper caution and perfect fairplay should be used on both sides. **1 Alison 144.** A prize-fight is illegal, and all persons aiding and abetting therein are guilty of assault, and the consent of the persons actually engaged in fighting to the interchange of blows does not afford any answer to the criminal charge of assault; but mere voluntary presence does not render persons so present guilty of an assault as aiding or abetting in such a fight.

'No consent to cause death or grievous hurt' : This section does not permit a man to give his consent or anything intended or known to be likely to cause his own death or grievous hurt to him.

88. Act not intended to cause death, done by consent in good faith for person's benefit : Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Illustration

A, a surgeon, knowing that a particular operation is likely to cause death of Z, who suffers under the painful complaint, but not intending to cause Z's death, and intending, in good faith Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

COMMENTS

The preceding section allows any harm to be inflicted short of death or grievous hurt. This section sanctions the infliction of any harm if it is for the benefit of the person to whom it is caused. No consent can justify an intentional causing of death. But a person for whose benefit a thing is done may consent that another shall do that thing, even if death may probably ensue. If a person gives his free and intelligent consent to take the risk of an operation which, in a large proportion of cases, has proved fatal, the surgeon who operates cannot be punished even if death ensues. Similarly, if a person attacked by wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, it would not be expedient to punish them, though they might by firing cause his death; and though when they fired they knew themselves to be likely to cause his death.

Difference between Section 87 and Section 88 : This section differs from the last section in two particulars :--

- (1) under it any harm except death may be inflicted;
- (2) the age of the person consenting is not mentioned (but See Section 90 under which the age of the consenting party must at least be twelve years).

A headmaster, who administers in good faith moderate and reasonable corporeal punishment to a pupil to enforce discipline in a school, is protected by this section and is not guilty of an offence under Section 323. **51 Bom. L R 103.**

89. Act done in good faith for benefit of child or insane person, by or by consent of guardian : Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person:

Provided First : That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;

Secondly : That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt; or the curing of any grievous disease or infirmity;

Thirdly : That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;

Fourthly : That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

A, in good faith, for his child's benefit without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

COMMENTS

Scope : This section empowers the guardian of an infant under twelve years or an insane person to consent to the infliction of harm to the infant or the insane person, provided it is done in good faith and is done for his benefit. Persons above twelve years are considered to be capable of giving consent under Section 88. The consent of the guardian of a sufferer, who is an infant or who is of unsound mind shall have the same effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind.

Benefit : Mere pecuniary benefit is not benefit within the meaning of this section.

A school master may for purposes of discipline inflict moderate punishment and such punishment may be inflicted for offences committed not only within the school limits but also outside the school walls except when the school is closed for any length of time for a period of regular holidays.

90. Consent known to be given under fear or misconception : A consent is not such a consent as is intended by any action of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person : If the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child : Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

COMMENTS

This section describes what is not consent.

This section says that a consent is not a true consent if it is given--

- | | |
|--|---|
| (1) by a person under fear of injury; | and the person obtaining the consent knows or has reason to believe this, |
| (2) by a person under a misconception of fact; | |
| (3) by a person of unsound mind; | and who is unable to understand the nature and consequence of that to which he gives his consent. |
| (4) by a person who is intoxicated; | |
| (5) by a person under twelve years of age. | |

Consent is an act of reason, accompanied with deliberation, the mind weighing as in balance, the good and evil on each side. Consent means an active will in the mind of a person to permit the doing of the act complained of, and knowledge of what is to be done, or of the nature of the act that is being done, is essential to a consent to an Act. **1872 L R 2 C C R 10.**

Consent and submission : These terms are not synonymous. There is a difference between consent and submission; ever consent involves a submission; but it by no means follows that a mere submission involves consent. Mere submission by one who does not know the nature of the act done cannot be consent.

Misconception of fact : Consent given under a misconception invalid if the person to whom the consent is given is aware of its existence. A consent given on a misrepresentation of a fact is one given under a misconception of fact within the meaning of this section. An honest misconception by both the parties, however, does not invalidate the consent. For instance, where a party of enunchs, who were not skilled in surgery were employed by a person to emaculate him, performed the act with his consent, the enunchs were held guilty of culpable homicide not amounting to murder. **5 W R 7 (Cr.).** The accused, who professed to be snake-charmers, persuaded the deceased to allow themselves to be bitten by poisonous snake, inducing them to believe that they had power to protect them from harm. It was *held that* the consent given by the deceased allowing themselves to be bitten did not protect the accused, such consent having been founded on a misconception of fact, that is, in the belief that the accused had power by charms to cure snake-bites, and the accused knowing that the consent was given in consequence of such misconception.

The consent of an insane woman is no consent in the eye of law and a person who subjects such a woman to sexual intercourse cannot escape liability for an offence under Section 376 of the Penal Code. **P L D 1959 Lah. 38.**

91. Exclusion of acts which are offences independently of harm caused : The exceptions in Sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent or on whose behalf the consent is given.

Illustration

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore it is not an offence by reason of such harm; and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

COMMENTS

Scope : This section serves as a corollary to Sections 87, 88 and 89. It says explicit terms that consent will only condone the act causing harm to the person giving the consent which will otherwise be an offence. Acts which are offences independently of any harm which they may cause will not be covered by consent given under Section 87, 88 and 89, e.g., causing miscarriage, public nuisance, offences against public safety, morals, etc.

92. Act done in good faith for benefit of a person without consent : Nothing an offence by reason of any harm which it may cause to a person by whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:

Provided First : That this exception shall not extend to the intentional causing of death, or the attempting to cause death;

Secondly : That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;

Thirdly : That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;

Fourthly : That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustration

(a) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A not intending Z's death but in good faith for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(b) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit A's ball gives Z a mortal wound. A has committed no offence.

(c) A, a surgeon, sees child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(d) A is in a house which is on fire with Z, a child. People below hold out a blanket. A drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child and intending, in good faith, the child's benefit. Here even, if the child is killed by the fall, A has committed no offence.

Explanation : Mere pecuniary benefit is not benefit within the meaning of Sections 88, 89 and 92.

COMMENTS

Scope : This section meets those cases which do not come either under Section 88 or Section 89. The principal object of Sections 88, 89 and 92 is protection of medical practitioners. Illustrations (a) and (b) exemplify cases in which it is impossible to give consent; illustrations (c) and (d) where legal capacity to consent is wanting.

Where the accused, a man of education and wealth and living in a town where medical attendance could be procured, chained up his brother who was subject to fits of violent insanity with lucid intervals, for over three months in a cruel way, it was *held that* he could not be said to have acted with due care and attention and was guilty of an offence under Section 344. **I L R 45 All 495.**

Pecuniary benefit : The Explanation to this section, coupled with Section 88, does not justify the performing of a dangerous surgical operation by an unskilled person, although it was not intended to cause death, for the mere pecuniary benefit of the person voluntarily submitting to it. **5 W R 7 (Cr.).**

93. Communication made in good faith : No communication made in good faith is an offence by reason of any harm to the person to whom it is made for the benefit of that person.

Illustration

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

COMMENTS

To come within the protection given by this section communication must have been made in good faith and for the benefit of the person to whom it is made.

The communication should, however have been made--

- (1) to the sufferer of the harm,
- (2) for his benefit, and
- (3) in good faith.

A surgeon in good faith communicates to a patient his opinion that he will not live. The patient dies in consequence of shock. The surgeon has committed no offence, though he knew it to be likely that the communication might hasten the patient's death. The benefit accruing to the patient in this case is the timely warning of his approaching death so that he can arrange his temporal affairs to his satisfaction.

94. Act to which a person is compelled by threats : Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1 : A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2 : A person seized by a gang of dacoits, and forced by threat of instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

COMMENTS

Criminal law is itself a system of compulsion on the wide scale. Surely it is at the moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening their command. If impunity could be so secured a wide door would be opened to hallusion and encouragement would be given to association of male factors secret or otherwise".

This section provides exemption for offences committed by a person who does any act except (1) murder, and (2) offences against the State punishable with death, done under fear of instant death, but fear of hurt or even of grievous hurt is not a sufficient justification. Mere menace of future death will not be sufficient.

The fear of hurt or grievous hurt is not enough. Even fear of future death is not sufficient for availing the protection provided by this section. Pressure or temptation is also not an

excuse for breaking law. Further the accused should also not place himself in the situation of such constraint, either of his own accord or due to some apprehension of harm other than death. No man from a fear of consequence of death to himself has a right to make himself a party to committing mischief on mankind.

Except where unsoundness of mind is proved or real fear of instant death is proved, the burden being on the prisoner, pressure of temptation is not an excuse for breaking the law. **I L R 20 Bom. 215.** The doctrine of compulsion and necessity is limited to the provisions of this section in Pakistan.

Threats previously made may be a continuous menace. **P L D 1958 P C 100.**

Only threat mentioned by appellant approver telling him that if he did not fall in a line he would find himself on road. Such, *held*, did not mean a threat of instant death; at best it could mean removal from service. Benefit of Section 94 was not available in circumstances. **P L D 1979 S C 53.**

To obtain the benefit of the exception allowed by this section, it must be shown that the prisoners were compelled to do as they had their apprehension that instant death would be the consequence of a refusal. **(1868) 10 W R 48.** A man who, in order to escape death under such circumstances that he believes and has reasonable ground for believing that it was the only means of preserving life, kills another for the purpose of eating his flesh, is guilty of murder. **I L R 14 Bom. 115.**

95. Act causing slight harm : Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm, is so slight that no person of ordinary sense and temper would complain of such harm.

COMMENTS

Scope : The section is based on the maxim *de minimis non curat lex* (the law takes no account of trifles). To illustrate the rule, the authors of the Code observe: "Clause 73 (this section) is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the Penal Law, are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the Tribunals, as innocent. As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his waters, an assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident acts we think it far better expressly to except them from the penal clauses of the Code than to leave it to the Judges to except them in practice."

Men living in society must suffer some inconveniences, without which no society is possible. Public servants charged with the responsibility of removing public grievances are all the more expected to make allowance for and not to overtly react to a display of anger and even petty transgression on the part of an aggrieved member of the public. **P L D 1976 Lah. 144.**

Allegations of fraud, etc., in notice exchanged between Advocates : The accused's reply to a notice of action, on a cotton contract, served by advocate of complainant on the accused, contained allegations of fraud, misrepresentations, bribery and corruption against the complainant. The reply was sent through an advocate to the complainant's advocate. On a petition for revision for quashing proceedings under Section 500, P.P.C. It was *held* that this was a letter by one advocate to another containing a defence to an action which appeared impending over the contract. Such imputations are unfortunately made lightly in correspondence between advocates on behalf of their clients. Damages which could be

recovered as a result of such publication being exceedingly lightly Section 95 applied to the case. **P L D 1955 Sind 320.**

Of the Right of Private Defence

96. Things done in private defence : Nothing is an offence which is done in the exercise of the right of private defence.

COMMENTS

Scope : There is no right of private defence under the Code against any act which is not in itself an offence under it. **P L R 1949 Lah. 331.** An act done in exercise of the right of private defence is not an offence and does not, therefore, give rise to any right of private defence in return. **A I R 1917 (L B) 12.**

This right of defence is absolutely necessary. The vigilance of Magistrates can never make up for the vigilance of each individual on his own behalf. The fear of the law can never restrain bad men so effectually as the fear of the sum total of individual resistance. Take away this right and you become in so doing the accomplice of all bad men. (**Bentham**). The law does not require a citizen, however law-abiding he may be, to behave like a rank coward on any occasion. The right of self-defence, as defined by law, must be fostered in the citizens of every free country. If a man is attacked he need not run away, and he would be perfectly justified in the eye of law if he holds his ground and delivers a counter-attack to his assailants provided always, that the injury which he inflicts in self-defence is not out of proportion to the injury with which he was threatened. **A I R 1930 Lah. 93.**

Right of Private Defence : According to this section nothing is an offence which is done in the exercise of the right of private defence. The Code does not define the right but only states its extent and limitation and the conditions to which it is subject.

The whole law of private defence is contained in Sections 96 to 106 of the Code. Right of private defence is recognised by the Code both in cases of person and property. Certain sections touch both the rights while others apply to defence of person and certain to defence of property. The whole law can be summarized in the following way:

- (1) the right of private defence is available for defence of person and property both as given in Section 96;
- (2) the right given in Section 96 can be exercised not only to protect one's own body or property but also to protect any other person's body or property (See S. 97);
- (3) the right is exercisable even against acts of persons of unsound mind (See S. 98);
- (4) the right of private defence is not available against the acts done by public servants under the colour of their office in good faith unless there is apprehension of death or of grievous hurt (See S. 99);
- (5) there is no right of private defence while there is time to have recourse to the protection of public authorities (See S. 199);
- (6) the right does not extend to causing more harm than is necessary (See S. 99);
- (7) the right of private defence of body even extends to causing death if there be an apprehension of death or grievous hurt or an assault for rape or unnatural offence, or for kidnapping, abduction or wrongful confinement (See S. 100);
- (8) in other cases not covered by previous paragraphs, any harm other than death may, be caused in exercise of right of private defence (See S. 101);
- (9) right of defence of body commences as soon as apprehension arises and continues till that apprehension continues (See S. 102);

- (10) right of defence of property extends even to causing death against the acts of robbery, house-breaking by night, mischief by fire (See S. 103);
- (11) in other cases not covered by last paragraph, any harm other than death may be caused (See S. 104);
- (12) the right of defence of property commences with the apprehension or danger to property and continues till the danger exists (See S. 105);
- (13) the right against assault causing apprehension of death can be exercised even if there is risk of harm to some innocent persons (See S. 106);

This section in effect justifies a crime committed in self-defence. The reason for this is that the law does not require a citizen however law-abiding he may be, to behave like a rank coward on any occasion. So if a man is attacked he need not run away; he would be perfectly justified in the eye of law if he holds his ground and delivers a counterattack on his assailant provided always that the injury which he inflicts in self-defence is not out of proportion to the injury with which he was threatened. **A I R 1930 Lah. 93.**

Right of private defence is circumscribed by limitations and exceptions contained in the Code. **P L D 1952 F C 1.**

Version put forward by the accused that the complainant party had attacked him and his father by coming to their house and he had simply retaliated in the exercise of the right of private defence seemed to be correct. Presence of four injuries on the body of the accused supported by medical evidence, admission of the complainant finding the accused in an injured condition in the hospital and involvement of the complainant party as accused in the counter-case, had clearly indicated that the accused had acted under the right of his private defence of his body feeling an apprehension regarding the safety of his person. Accused even could not be convicted on the same evidence which had been disbelieved against the rest of the co-accused. Accused who had been attacked by the complainant party was fully entitled to the benefit of self-defence as defined under Section 96, P.P.C. and he was acquitted accordingly. **1996 PCr. LJ 790 (b).**

Deceased assaulted while engaged in sexual intercourse with minor daughter of accused : Whether the girl was a consenting party or not, she being a minor, the act of intercourse amounted to rape within the meaning of Cl. sixthly of Section 375. In the circumstances, *held*, accused father entitled to right to private defence under Sections 96 and 97 read with Section 100. Conviction and sentence under Section 325 maintained by High Court therefore *set aside* and accused acquitted. Appeal allowed. **1994 P S C (Cri.) 650.**

Aggression : This right cannot be pleaded by persons who, believing they will be attacked, counter the attack. **P L D 1965 Lah. 533.**

Landlord cannot take law in his own hands and pre-emptorily throw away household effects of a defaulting tenant. Tenant and his family members, have every right to use reasonable force to defend their possession against trespass. **1980 P Cr. L J 59.**

97. Right of private defence of the body and of property : Every person has a right, subject to the restrictions contained in Section 99, to defend:

First : His own body, and the body of any other person, against any offence affecting the human body;

Secondly : The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

COMMENTS

Right of Private Defence of Body and Property : This section gives the extent of the right of private defence and Section 99 prescribes the limits on the exercise of this right. Under this section even a stranger may defend the person or property of another person. **P L D 1961 Azad J&K 1.**

The right of private defence is also available against an attempt to commit offence against the person or property **P L D 1960 Lah. 62** and arises only when the wrongful or unlawful act done or attempted to be done against a person or property is an offence of the nature described in this section. There can be no right of self-defence against an anticipated action. It is only a reasonable apprehension of damage or mischief to the property or harm to person that gives rise to the right of "self-defence" subject always to the limitations contained in Section 99 of the Penal Code. And there can be no reasonable apprehension without a positive overt act by the opposite side. **P L D 1959 Lah. 1009.** The right of private defence is of two kinds, i.e. :-

- (1) right to defend person, and
- (2) right to defend property.

The former includes the right to defend the person or any other person, and the latter includes the right to defend the property of any other person also.

Principles governing right : Some of the well-known principles governing right of private defence are :-

- (i) when an accused person is in the process of exercise of his right of private defence, he is not expected to weigh his actions "in golden scales";
- (ii) nor can he be expected to "modulate his defence step by step";
- (iii) it is not possible in such a situation for the accused to keep the proper sequence and account of "action and counter-action" of the adversaries;
- (iv) the attitude of a "cool by-stander" cannot be expected from a person who is in the fight or is under an attack; and
- (v) that benefit of reasonably possible doubt even in matter of self-defence must be resolved in favour of the accused.

Despite the above principles, it will not be proper to conclude from them or the case-law cited at the bar that even if circumstances of the case do not warrant certain finding of fact it must further be necessarily presumed to have been established. Facts are to be established from evidence and when established certain inferences may be drawn and assumptions raised, but this would depend upon the circumstances and facts of each case.

Circumstances for reaching correct conclusion : However, the following circumstances amongst others can be taken into consideration for reaching correct conclusions :-

- (i) Helpless physical state, if any, of the accused;
- (ii) position of the victim and accused;
- (iii) position of the victim and accused vis-a-vis mental and physical capacity as also any other advantage/disadvantage, during the various stages of the occurrence;
- (iv) actual physical contact and action demonstrated during the occurrence;
- (v) Capacity/competency of the victim to cause harm to the accused;
- (vi) apprehension of danger by one or the other and whether it was a warning;
- (vii) whether adoption of lesser means of defence was possible;

- (viii) background of both the parties, with particular reference to earlier threats or attempts of violence against each other;
- (ix) offence or defences offered by each party. It is clarified that the above circumstances do not by any means exhaust the list of similar circumstances.

Even if all these circumstances are taken into account still depending upon the facts of each case, there can be various shades of right of private defence. Some shades are *qua* the statutory provisions, for example, complete or partial defence. The latter may imply exceeding the right of private defence or no defence at all. The other shades might relate to the question of the sentence only. The above considerations would in some cases intermingle with other subjects like grave and sudden provocation and sudden right. **P L D 1974 Lah. 274.**

Defence of person : The right of such defence commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed and it continues as long as the apprehension of the danger to the body continues. But the counter-attack must not be out of proportion to the force applied to the original attack. A person has a right to defend not only his own body but also the body of any other person. **P L D 1961 Azad J & K 1.** Where a person sees a woman assaulted, he can interfere to save the woman and kill the assailant, if necessary. But there is no right of private defence if both parties deliberately fight or there is time to have recourse to authorities. **A I R 1927 Lah. 740.**

Law relating to the right of private defence : The recognition of the right of private defence is simply a recognition of the importance of the instinct of self-preservation for the well-being of human society. Self-defence is the nature's oldest law. It is based on the law of necessity of self-preservation. The right of self-defence conferred by Section 86, P.P.C. is to the effect that every person has a right to hold his ground manfully and not to run away like a coward. The only consideration is that a person threatened with danger of injury should not exceed the limits fixed by the law. This, of course, depends upon reasonable apprehension of danger to the person under the particular circumstances of the case. It is reasonable apprehension of danger to the body and not the actual injuries received that should judge the justification of the act of the accused. The reasonableness of the apprehension is a question of fact which depends upon the weapon used, the manner of using it, the nature of assault or other surrounding circumstances. If people armed with lethal weapons were permitted to enter the abode of peaceful citizens to commit criminal trespass and at the same time occupants were not given complete right of defence to repel it with force, then it will tantamount to conceding to the law of jungle. The defiant and headstrong members of society will set at rampage and nobody will be safe in his house and the very golden concept that one's house is his castle will be destroyed. **1975 P Cr. L J 772.**

A husband or any body has a right to commit death of a person who makes an assault with the intention of committing rape. **1973 P Cr. L J 387.**

Defence of property : This right commences when a reasonable apprehension of danger to the property commences. The term 'property' includes movable and immovable property. In such cases all that is necessary for the defence to show is that he is in actual possession of the property and the question as to right to possession is immaterial. If two persons invade the house of a person he is entitled forthwith to eject them by using reasonable force for the purpose. He is not bound to go to the police leaving them in the house. **18 Cr. L J 862.**

Mere entry in the land of another in absence of proof of forcible possession does not provide a right of private defence of the property. **1994 M L D 1258.**

The right of private defence of property is available to a person in *de facto* possession of the same even against a lawful owner. **P L D 1960 Lah. 62.** Certain persons were lawfully in therefrom by force. The expected attack came and there was a severe fight. Both parties were

injured. It was *held that* the persons in possession of the land were within their right to be in readiness to repel the attack and were protected. Where a person who had seized cattle which had been trespassing on his lands, gathered together a number of men to assist him in resisting an anticipated attempt to rescue the cattle, and a fight between the parties took place, in which several men on each side, were killed and injured, it was *held that* the person who had seized the cattle and his party were protected by this section. The right of private defence is not, therefore, limited to persons who are entitled to possession but extends to such other persons as they may have gathered there to help them to protect their right. **1942 M W N 42.**

Right of private defence against criminal trespass entitles the person in actual physical possession to use such force as is necessary to maintain his possession and turn away intruders. Right, however, cannot be extended to a case of premeditated riot primary object of opposing faction being to fight and complaint about trespass merely a pretence. **P L D 1979 Lah. 621.**

Where the primary object of both the parties is to fight and the vindication of their right to property is merely a pretence, no question of self-defence arises. When an occupier of land happens to find to trespasser on his land the occupier is not entitled by law straightaway to use force against the trespasser under the guise of self-defence. **P L D 1958 Azad J & K 34.**

Appreciation of evidence : Trial Court by summoning the Court-witnesses on the application of prosecution had acted beyond its jurisdiction in collecting evidence against the accused which was not collected or produced by the prosecution and had tried to fill in the lacunae in the prosecution case. Accused had no notice of his alleged dispossession from the land in dispute and he was justified in claiming to be in possession of the same on the day of occurrence. Trial Court had not believed the prosecution witnesses *qua* 11 accused out of 12 accused who had been acquitted. Ocular evidence which suffered from intrinsic inconsistencies was not free from faint and malice and was not corroborated by any independent evidence, not even by medical evidence and evidence of recoveries. Enmity between the parties was admitted. Prosecution had failed to prove its case beyond doubt and the accused was found entitled to the right of self-defence of person and property in the circumstances of the case. Accused was acquitted accordingly. **1996 P Cr. L J 1758.**

Two versions put up--Duty of Court : In cases where two versions are put forward the duty of the Court is to review the entire evidence and circumstances at the close, before arriving at a conclusion regarding the truth or falsity of the defence plea. All the factors favouring the belief in the accusation must be placed side by side to the corresponding factors favouring the plea of defence and the total effect should be estimated in relation to two questions, *viz.*, (i) Is the explanation of the accused satisfactorily established by the evidence and circumstances appearing in the case. (ii) If the answer to question No. 1 be in the negative, is there yet a reasonable possibility that his explanation may be true, so as to cast a reasonable doubt upon the prosecution case. **1979 Cr. L J 505.**

98. Right of private defence against the act of a person of unsound mind, etc. : When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations

(a) Z, under the influence of madness, attempts to kill A; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(b) A enters by night a house which he is legally entitled to enter. Z in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no

offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

COMMENTS

This section lays down that for the purpose of exercising the right of private defence physical or mental incapacity of the person against whom the right is exercised is no bar.

The right of defence would have lost most of its value if it was not allowed to be exercised against person suffering from the incapacities mentioned in this section. If Z a madman, not knowing the nature of his act, attempts to kill A, A has the same right of private defence as though Z was sane and deliberately trying to kill him.

99. Act against which there is no right of private defence : There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised : The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1 : A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2 : A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if deemed.

COMMENTS

Scope : This section enumerates the limitations put on the exercise of the right of defence. Whereas Section 96 invested the powers of right of private defence. Section 97 gave powers to defend one's own body or the body of any other person and the property whether movable or immovable subject to the restriction provided in Section 99. Section 98 gave right of private defence against the act of person of unsound mind, etc.

First Clause : This clause applies to those cases in which the public servant is acting (1) in good faith, and (2) under colour of his office, though the particular act being done by him may not be justifiable by law.

Good faith requires due care and attention as provided in Section 52 of the Pakistan Penal Code. Under Section 99, Pakistan Penal Code, good faith of the public servant is

essential for depriving the man arrested of the right of private defence. Where an Assistant Sub-Inspector arrested a person merely on a report of apprehension of breach of the peace, he did not act in good faith. It was *held that* there must have been material before the A.S.I. that the case was one of emergency and that without arrest the commission of the offence could not be prevented. There was, therefore, a right of private defence against the action of the Sub-Inspector in arresting the accused. **P L D 1954 Lah. 119.**

The protection afforded under Section 99, Pakistan Penal Code to public servants is not lost even if they make any mistake in the exercise of their proper functions. In this case the mistake, if any, was not made by the peons but by the *Naib-Tehsildar* whose orders they were bound to obey and the *Naib-Tehsildar* too cannot be said to have no jurisdiction to issue warrants for the arrest of person who do not pay land revenue. In this case he may have exceeded that jurisdiction in ordering arrest of person who, without his knowledge, had been exempted from payment of the revenue on account of *Kharif 1947*. Section 99, Pakistan Penal Code applies to cases where there is excess of jurisdiction as distinct from a complete absence of jurisdiction. It applies where an official does wrongly what he might have done rightly; but not to cases where the Act could not possibly have been done rightly. **P L D 1951 Lah. 142.**

Where articles protected from attachment were attached, it was *held that* this act did not justify resistance. Where the property of a person was wrongfully attached as the property of certain absconders, it was *held that* the rightful owner had no right of private defence of his property, as the police officer was acting in good faith under colour of his office, and that even supposing the order of attachment might not have been properly made, that would in itself be no sufficient ground for such a defence.

Second clause : The first clause speaks of acts done by a public servant, this clause, of acts done under the direction of a public servant. It is not necessary that the doer should be a public servant. Explanation 2 must be read conjointly with this clause.

There is no right of private defence against persons who act under the direction of a public servant like a bailiff who acts in good faith under colour of his office, though that act might not be strictly justifiable by law. **A I R 1936 Lah. 851.**

Third clause : This clause places an important restriction on the exercise of the right of private defence. The right of private defence being granted for defence only, it must not and cannot legally be exercised when there is time to have recourse to the protection of public authorities. The right of private defence does not take the place of the function of those public servants who are especially charged with the protection of life and property and the apprehension of offenders, and where the assistance of the public authorities can be procured, the right cannot be lawfully exercised. But the law does not intend that a person must run away to have recourse to the protection of public authorities when he is attacked instead of defending himself. The important considerations which always arise in order to determine whether the action of the accused is covered by the right of private defence are *firstly*, what is the nature of the apprehended danger, and, *secondly*, whether there was time to have recourse to the public authorities, always remembering that when both the parties are determined to fight and go up to the land fully armed in full expectation of an armed conflict in order to have a trial of strength, the right of private defence disappears.

Person actually seeing thief in possession of his goods, need not run to seek protection of public authorities. He is entitled to use reasonable force short of causing death to deprive thief of booty. **P L D 1963 Azad J & K 90.**

Fourth clause : The right of private defence is restricted to not inflicting more harm than it is necessary to inflict for the purpose of defence. The amount of force necessarily depends on the circumstances of the case, and there is no protection if the harm is caused by excessive violence quite unnecessary to the case. For example a person set by his master to watch a garden or yard is not at all justified in shooting at, or injuring in any way, persons who

may come into those premises, even in the night. He ought first to see whether he could not take measure for their apprehension. The measure of self-defence must always be proportionate to the quantum of force used by the attacker and which it is necessary to repel.

Where the accused finding a thief entering the house at night, through an entrance made in the side-wall, seized him while intruding his body and held him with his face down to the ground to prevent his further entrance and hereby his death was caused by suffocation, where a person attacked by another with a spear struck a blow with a club which resulted in the death of the party attacking, and where a boy found a person stealing his property and killed him but not intending to do so, the right of private defence was held to be a good justification.

Similarly, where an accused, in exercise of the right of self-defence, inflicted an injury on the thigh of the deceased, which proved fatal, it was *held that*, in circumstances of the case, the accused had not exceeded the right of self-defence. **P L D 1965 Pesh. 11.** Likewise where the accused was attacked by several armed assailants whereupon he dealt blunt edge hatchet blow on one assailant and sharp edge blow on another, thus killing him, it was held that blows given in defence cannot be weighed in golden scales and the right of private defence had not been exceeded. **P L D 1965 Quetta 33.** The extent of the right of private defence cannot be weighed in golden scales and Courts view with indulgence acts of a person who in heat of moment pursues his defence a little further than is absolutely necessary. **P L D 1966 Lah. 8.**

Section 99 read with Section 302 : There is no doubt that Section 99 of the Pakistan Penal Code has circumscribed the right of private defence by laying down that it in no case extends to the inflicting of more harm than necessary for the purpose of defence but it depends on the facts of each case as to how much force or number of blows would be required to repel an assault giving rise to an apprehension of death or grievous hurt. The law relating to self-defence has thus made the victim of such an assault the Judge of his own peril and permitted him to repel the attack even to the taking of the life of his assailant, so the Courts are to judge him by placing themselves in the same position in which he was placed. In the present case, the deceased had come to the house of accused, armed with a *lathi* and opened an attack on him by planting a blow on the middle of his head followed by another blow on his leg indicating a persistent assault on the accused, which certainly involved the apprehension of at least a grievous hurt. In defending himself against this violent attack, the accused caused four injuries to deceased. There was not much disparity in the number of injuries suffered by the accused and those inflicted by him in his defence as only one of these four injuries was declared dangerous to life. To hold that the victim of such an assault after inflicting a *lathi* blow on the head of his assailants in self-defence a little harder than necessary exceeded this right of feeling himself still in danger delivered one or two more blows to him would be placing a greater restriction on the right of private defence of the body than the law prescribed under Section 99 of the Pakistan Penal Code required. **P L D 1972 Lah. 596.**

More harm caused than necessary : Where a person killed a weak old woman found stealing at night, where a person caught a thief in his house at night and deliberately killed him with a pick-axe to prevent his escape, and where a number of persons apprehending a thief committing house-breaking strangled him and subjected him to gross maltreatment when he was fully in their power, the right of private defence was negated.

Where the determined attack with hatchet or hatchets on the head of the deceased was actuated by a desire to punish the deceased and not for the purpose of defence, the accused were held to have exceeded the right of private defence. **P L D 1954 Lah. 170.** Courts have, however, always viewed with indulgence the act of a person who in the heat of the moment, pursues his defence a little further than is absolutely necessary. **P L D 1959 Lah. 753.** Where the deceased with an ordinary stick delivered two initial blows to the accused causing very simple injury, the accused, drew out his dagger and delivered no less than eight blows to the deceased, five of which were sufficient to cause death. It was *held that* the accused did not act either in good faith or without any intention of doing more harm than was necessary and as

such plea to private defence not being available to him, was guilty of murder. **P L D 1960 Pesh. 105.**

Explanation : Both the Explanations given in the section relate to clauses First and Second of the section. They lay down that a person is not deprived of the right of private defence, in other words a person has the right of private defence, even against a public servant, if he does not know or has no reason to believe that the person doing the act was a public servant.

100. When the right of private defence of the body extends to causing death : The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--

First : Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly : Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly : An assault with the intention of committing rape;

Fourthly : An assault with the intention of gratifying unnatural lust;

Fifthly : An assault with the intention of kidnapping or abducting;

Sixthly : An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

COMMENTS

Scope : This section authorizes a person, who is under a reasonable apprehension that his life is in danger or that any of the offences mentioned in this section is going to be committed, to inflict (i) death, or (ii) any other harm to the assailant either when the assault is attempted or directly threatened. But the exercise of this right is restricted to the limits mentioned in Section 99 and the apprehension must be reasonable and the violence inflicted must not be out of all proportions to the apprehended danger. It must be reasonably necessary for the purpose of self-defence. As for instance, a person is not justified in shooting another who is about to arrest him when there is nothing to show that he has reason to apprehend that any of the acts mentioned in this section would ensure.

Private defence, right of : Accused, even in the absence of any evidence of his own in his defence, is entitled to support his plea of right of private defence from the circumstances appearing from prosecution evidence itself. **1994 S C M R 1733.**

Right of private defence is inferable from the facts and circumstances of the case. The right has to be allowed to accused despite facts that he himself had not claimed such right in his statement under Section 342, Cr.P.C. **P L D 1974 S C 67.**

Accused having right of self-defence, inflicting injuries on neck and upper part of body of deceased. Result of scaring away assailants could be achieved by firing at lower part of the body. Accused, exceeded the right of private defence. Conviction altered to be one under Section 304 (1) in circumstances of case. **1979 P Cr. L J 505.**

Prosecution had failed to prove its case against accused beyond all reasonable doubts benefit of which was to go to accused. Additionally, accused's plea of self-defence as against the prosecution story was more plausible. Accused whose two brothers had already been

murdered by the complainant party had naturally apprehended danger to his life when the deceased and others on appearing in the Emergency Ward of the Hospital had started firing. One pistol and two empties were recovered from near the deceased. Extent of apprehension of the accused in such a situation could not be weighed in golden scales. Accused had exercised his right of self-defence available to him under the law and had not exceeded reasonable limits. Accused was acquitted in circumstances **1997 M L D 980**.

Accused had no motive for the commission of the offence, rather the complainant party had the motive to avenge the beating of the prosecution witness. Recoveries of the weapons of offence from the accused had been effected in violation of the mandatory provisions of Section 103, Cr.P.C. and through a chance witness and an interested witness and the same were disbelieved. Investigation of the case suffered from patent *mala fides*. Accused had also suffered injuries and had given a counter-version of the occurrence and when both the versions were put in juxtaposition defence version was found to be reasonably plausible. Fracture of ribs and shoulder bone suffered by accused was sufficient to give apprehension to them that death might also be caused. Accused, thus, had exercised the right of self-defence of their person and they did not exceed the same. Accused were acquitted in circumstances. **1996 P Cr. L J 2052**.

Plea of self-defence : Plea of right of self-defence can be accepted by the Courts if spelt out from the evidence even if no clear and specific plea has been taken by an accused. **1996 P Cr. L J 1833 (b)**.

Plea of self-defence, for proper appreciation, is to be put in juxtaposition with prosecution case. It is to be accepted when prosecution fails to prove its case beyond all reasonable doubt.

Plea need not be specially raised : The mere fact that an accused person has not pleaded that he acted in the exercise of the right of private defence, does not preclude the Court from giving a finding that the accused had acted in the exercise of the right of private defence, but before the Court holds that a person did an act in the circumstances not pleaded by him, the evidence with regard to those circumstances must be very cogent and not open to any doubt. **P L D 1960 B J 1**. Plea of private defence can be allowed whether or not specifically pleaded by accused. Such an inference must be warranted by evidence brought on record which would go at least to the extent of showing that it was reasonably possible that accused persons had acted in self-defence. **N L R 1980 A C 390**. If such plea can be spelt out from the evidence and the circumstances of the case, the accused should not be denied the benefit of the same only because he has not expressly pleaded it. **1979 P Cr. L J 505**.

Where accused did not specifically raise the plea of self-defence nor produce in evidence in defence. Possibility of any reaction on prosecution case altogether excluded. Rule that even if plea of self-defence fails Court has duty to take into account all facts appearing on record, held was not applicable in circumstances of case. **P L D 1973 S C 418**.

Murder committed not at spur of moment but in cold-blood with premeditation to take revenge for murder of accused's father. Injuries on person of accused explainable as same received by them during process of being caught. Conviction and sentence of death were maintained, in circumstances. **P L D 1981 Kar. 184**.

Where Court is in doubt whether right is exceeded. Benefit has to go to accused. **1968 P Cr. L J 602**.

Accused cannot be expected to weigh his blows in golden scales or modulate his defence by step in heat of moment. **1968 P Cr. L J 1022**.

Where it was assumed that the stone was thrown by the appellant and it did hit the deceased, it is to be remembered that upon any version of the matter it was deceased who threw the first stone and that in these circumstances the appellant would have the right to protect himself by causing injuries to the deceased in turn. He would clearly be in the right of private defence. **1974 P Cr. L J Note 100**.

Homicide in self-defence is justifiable, although the party killing was guilty of an assault, or engaged in an unlawful conflict: Provided (1) that the party killing did not either commence or provoke the attack with intent to kill or do grievous bodily harm, (2) that he killed the assailant because he had reasonable cause for believing it to be necessary so to do, in order to avoid immediate death. Whether the apprehension was reasonable or not is a question of fact to be decided according to circumstances of each case. **P L D 1961 B J 22.**

Deceased being unarmed giving no apprehension to accused of death or grievous hurt. Possibility that some dispute over gambling took place between the parties on previous occasion on which the deceased hurled abuses on the accused and on coming across each other per chance confrontation culminated in infliction of stab wounds to deceased. Circumstances also suggesting that some sort of grabbing between parties proceeded fatal attack on the deceased. Accused in the circumstances held to have exercised right of self-defence in far excess the requirements of Section 100. **1981 P Cr. L J 324.**

The accused party attacked first and the accused gave a single blow on the head of the deceased with *kassi*, using in loading manure in a cart. The situation demanded of the accused to do something not only to save himself but also his aged father. The motive part of the prosecution story was also not believed by the trial Court. It was a case of self-defence falling under Section 100, *secondly*, P.P.C. Conviction and sentence under Section 304, Part II, P.P.C. were *set aside*, in circumstances. **1984 P Cr. L J 1436.**

Plea of the exercise of right of private defence not put forward in commitment proceedings but raised at a trial as an alternate version. Record showed that accused and their companions deliberately armed themselves and proceeded by a route leading to site of occurrence. The accused were held aggressors and no question of exercise of right of private defence could arise in their favour. **1981 S C M R 223.**

Plea of the accused to have attacked the deceased in exercise of the right of private defence was not held to be available to him in the circumstances that he attacked the deceased by giving him repeated blows with sharp side of the hatchet which he had hidden before the attack. **1981 P Cr. L J 185.**

The motive attributed to the accused for murder not established beyond reasonable doubt. Eye-witness's account was disbelieved. No independent evidence was forthcoming to corroborate such eye-witness's account against accused. Accused forced to submit to sodomy at knife point but accused snatched away knife from the deceased and when deceased tried to snatch it back, he was stabbed to death by accused by causing him several wounds. Some excess in causing harm to the deceased in circumstances held condonable. **1981 P Cr. L J 76.**

The case involving double murder by seven accused persons armed with *sota*, revolver, *khanjar* and *chhuries*. Trial Court in consideration of circumstances of the case rejected prosecution version but accepted the version of the accused persons that they inflicted injuries in the exercise of right of self-defence. Trial Court acquitting four co-accused by giving them benefit of doubt, convicted three appellants under Sections 304/34, P.P.C. and sentenced each of them to life imprisonment. Thereupon appellants filed appeal before the High Court. State Counsel and appellant's counsel admitted that approach of trial Court in rejecting prosecution version and accepting that of self-defence was correct. High Court after careful scrutiny of entire evidence on record endorsed the plea of trial Court in acquitting the accused. **N L R 1980 A C 235.**

Prosecution proving that on the day of occurrence when witnesses were coming back after offering condolences, deceased was going ahead of them with a pigeon in his hand. Accused tried to snatch pigeon and in that encounter pigeon flew away. Deceased caught hold of collar of deceased's shirt abused him. The accused took out a *Chhuri* from his *dub* and gave a blow on deceased's chest. Deceased died on the spot. The trial Sessions Judge sentenced accused to death. On appeal the accused contended before the High Court that he

was also attacked and suffered an incised injury on palm of his left hand. Further contended that the accused acted in the right of exercise of private defence be argued. It was *held that* infliction of a blow with *Chhuri* right on deceased's chest without any consideration of consequences show that the accused acted in excess of right of private defence. **N L R 1980 A C 174.**

Contention that not only brick-bats thrown into house but violent crowd also chained door from outside to prevent appellant from having recourse to public authorities and therefore appellant reasonably believed of either being killed or caused grievous hurt and accordingly appellant justified in firing shots in his defence. There being a tiff between parties and appellant having bolted door from inside, no occasion for others to have attacked house. Neither appellant nor any other inmate of house suffering injury either with fire-arm or with brick-bats. Gun fire by appellant in the circumstances held not to be justified. **1977 S C M R 450.**

The deceased tried to outrage the modesty of the accused (girl of 13/14 years age) against her will who got suddenly and gravely was provoked (as an oriental girl of impressionable age who being a true lover but not allowing the liberties before marriage), if the case was treated as that of assault by the deceased with use of some force to make amorous advances other than to commit rape, the accused had the right of private defence to cause any harm to the deceased subject to limitation contained in Sections 99 and 100, P.P.C. other than death. She having murdered the accused would be deemed to have exceeded by Exception 2 to Section 300, P.P.C. The case if located as one for uncertainty involving Exception 1 and/or 2 to Section 300, P.P.C. than condition laid down in Exception 4 to Section 300, P.P.C. would also be deemed to have been sustained. The accused was guilty of offence of culpable homicide not amounting to murder punishable under Section 304, Part I, P.P.C. The sentence of life imprisonment was reduced to imprisonment already undergone. **1984 S C M R 646.**

Benefit of doubt : Prosecution had failed to prove its case against accused beyond all reasonable doubts benefit of which was to go to accused. Additionally, accused's plea of self-defence as against the prosecution story was more plausible. Accused whose two brothers had already been murdered by the complainant party had naturally apprehended danger to his life when the deceased and others on appearing in the Emergency Ward of the Hospital had started firing. One pistol and two empties were recovered from near the deceased. Extent of apprehension of the accused in such a situation could not be weighed in golden scales. Accused had exercised his right of self-defence available to him under the law and had not exceeded reasonable limits. Accused was acquitted in circumstances. **1997 MLD 980.**

101. When such right extends to causing any harm other than death : If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in Section 99 to the voluntary causing to the assailant of any harm other than death.

COMMENTS

The extent to which the right of private defence of body extends is stated in Sections 100 and 101. Section 100 tells us in what cause the right extends to the voluntary causing of death while Section 101 tells us that in all other cases the right extends to causing of any harm other than death. Both the sections are, however, subject to the restriction mentioned in Section 99, that is, no more harm is inflicted than is necessary for the purpose of defence. If death is not caused, the person having the right to private defence is not guilty of any offence provided the provisions of Section 99 are not contravened. If death is caused, he would again be guilty of no offence, if he satisfies the requirements of Section 103, provided also the restriction in Section 99 are not contravened. If his case does not fall within Section 100, his causing death in excess of the right of private defence would be an exceeding his right of

private defence and would be an offence which may be murder or culpable homicide not amounting to murder or lesser offence.

102. Commencement and continuance of the right of private defence of the body : The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

COMMENTS

Object : This section indicates when the right of private defence of the body commences and till what time it continues. It commences and continues as long as danger to body lasts.

To invoke the protection of this section, there must be an attempt or threat and consequent thereupon an apprehension of danger, it is not a mere idle threat, or every apprehension of a rash and timid mind, that will justify the exercise of the right. A reasonable ground for the apprehension is requisite. If for instance the threat proceeds from a woman or child and is addressed to a strong man, there could hardly be a reasonable apprehension in the eye of law. Present and imminent danger seems to be what is meant. But if a man is preparing himself as by seizing a dangerous weapon in such a way that he manifestly intends immediate violence, this seems sufficient justification of the exercise of the right; for his conduct amounts to a threat and the other has reason to consider the danger to be imminent. Therefore, the right commences only on a reasonable apprehension of danger to body caused by an attempt or threat to commit an offence; but it is not necessary that actual harm should be caused. **P L D 1959 Pesh. 1.** Whether the right of private defence possessed by an accused was exceeded or not will depend, not on the actually continuing danger but on whether there was a reasonable apprehension of such danger. Law does not require a man to run away and have recourse to the protection of the public authorities and not to stand his ground and defend himself. **6 Cr. L J 271.**

Attempt or threat to commit an offence : The section does not require that the hurt should actually be caused before one can defend himself. It requires only that there should be reasonable apprehension, the term 'reasonable apprehension' we have already explained above, of danger arising from an attempt or threat to commit an offence.

Right of private defence of body-Extent of protection : Prosecution had failed to prove its case against accused beyond all reasonable doubts benefit of which was to go to accused. Additionally, accused's plea of self-defence as against the prosecution story was more plausible. Accused whose two brothers had already been murdered by the complainant party had naturally apprehended danger to his life when the deceased and others on appearing in the Emergency Ward of the Hospital had started firing. One pistol and two empties were recovered from near the deceased. Extent of apprehension of the accused in such a situation could not be weighed in golden scales. Accused had exercised his right of self-defence available to him under the law and had not exceeded reasonable limits. Accused was acquitted in circumstances. **1997 M L D 980.**

103. When the right of private defence of property extends to causing death : The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:--

First : Robbery;

Secondly : House-breaking by night;

Thirdly : Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling or as a place for the custody of property;

Fourthly : Theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

COMMENTS

Scope : Section 100 enumerates the cases to which the right of private defence of the body extends to the causing of death; this section enumerates the cases in which it extends to the causing of death in defence of property. Both the sections are subject to the provisions of Section 99.

The section allows death or any harm to be caused in exercise of the right of defence of property in the following situations :-

- (1) Robbery;
- (2) House-breaking by night;
- (3) When mischief is done by fire committed on any building, tent or vessel which are used as human dwelling or in use in place of the custody of property;
- (4) When trespass or theft or any mischief is going to be done and there is reasonable apprehension that if it is not averted, death or grievous hurt will be the consequence.

There is no right of private defence of property against persons intending to arrest a person carrying unlicensed arms and ammunition and taking those arms and ammunition as the act of those intending to arrest could not amount to theft and no offence of robbery or attempt thereof could be contemplated by them. **P L D 1961 Lah. 279.** Where the deceased and his companions wanted to effect an arrest which, under the law they were not entitled to do, their act would amount to an offence of wrongful confinement and the right of private defence which accrued to the appellant could not be said to have been taken away because his captors were under a misconception about their power to arrest him or had no criminal intention. The appellant had a right of private defence against an illegal arrest which the deceased and his companions wanted to effect. **P L D 1951 Lah. 287.**

The provision under Section 103 *fourthly* of the Penal Code, 1860 relates to the right of private defence of property extending to the causing of death against house trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised. The right of self-defence extended by this provision and other relevant provisions of the law is subject to the restrictions mentioned in Section 99 of the Penal Code, 1860, one of which is that, "the right of private defence in no case extends to the inflicting of more than it is necessary to "inflict for the purpose of defence." Where the deceased, who was killed with a dagger, had gone unarmed, to the house of the accused to claim back his wife, and his initial entry into their house was innocent and even after he had become a trespasser in the house at no stage was his act attended by any act or circumstances to create a reasonable apprehension in the minds of the opposite-party that death or grievous hurt will be the consequence of his act, it was *held that* all that the inmates of the house were justified in doing was to push the deceased out of the house with the minimum force necessary to ward off any harm occurring from the deceased who was unarmed. To injure him with a dagger was altogether uncalled for and beyond the necessities of the situation and the accused in stabbing the deceased on a vital part of his body had exceeded the right of private defence beyond measure and his act was not

protected by the right of private defence allowed under Section 103 fourthly of the Penal Code, 1860. **P L D 1960 Pesh. 19.**

104. When such right extends to causing any harm other than death : If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section that right does not extend, to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Section 99, to the voluntary causing to the wrong-doer of any harm other than death.

COMMENTS

This section is connected with Section 103 just as Section 101 with Section 100. Thus, where the offence which occasions the right of private defence of property is theft, mischief or criminal trespass, the right of defence under this section only extends to the voluntarily causing to the wrong-doers some harm other than death.

The right of private defence of property extends to causing at least grievous hurt in case of criminal trespass. **1969 P Cr. L J 533.**

Section 104 is inapplicable where death is caused in exercise of right of private defence. **N L R 1980 A C 326.**

Where a person was repairing radio with a screw-driver and a hooligan type of creditor walked into his shop and insolently demanded the repayment of a petty debt then and there and so worked himself up as to go to the extent of robbing that person of his "muffler" to prevent which he struggled first and then in exasperation hit him only once with the screw-driver he was holding, it was *held* that he acted in the exercise of the right of self-defence of property. **P L D 1959 Azad J & K 35.**

The landlord cannot take law in his own hands and pre-emptorily throw away household effects of a defaulting tenant. Tenant and his family members, it was held have every right to use reasonable force to defend their possession against trespass. "It is a trite proposition of law that a landlord cannot take law in his own hands, and pre-emptorily throw away the household effects of a defaulting tenant". Faced with this predicament tenant and his family members had every right to use reasonable force to defend their possession from a trespasser. The injuries were simple and could be caused as stated by the witnesses. Even the use of any other article would not be open to exception. This action of their would be covered by the principles of self-defence embodied under Sections 96 to 105, P.P.C. **1980 P Cr. L J 58.**

105. Commencement and continuance of the right of private defence of property : The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

COMMENTS

Scope : This section prescribes when the right of private defence of property commences and how long it would continue against the apprehension of commission of different offences. It is analogous to Section 102 in which similar provision is made for the right of private defence of the body. The first clause of this section lays down the rule as to the commencement of the right and the remaining clauses the duration of the right in respect of various offences against which it is exercised.

First clause : The right of private defence of property commences when a reasonable apprehension of danger to the property commences and continues only so long as the trespasser remains on the property. **P L D 1960 Pesh. 141.** Before such apprehension commences, the owner of the property is not called upon to apply for protection to the public authorities.

It is not the law that the rightful owner in peaceful possession of property must run away, if there is actual invasion of his right and an attempt on his person. The person in possession of property is entitled to defend himself and his property by force and to collect such members and such arms as are necessary for the purpose if he sees an actual invasion of his rights, which invasion amounts to an offence under the Penal Code, and when there is no time to get police help. It is lawful for a person who has seen an invasion of his rights to go to the spot and object. It is also lawful for such person if the opposite-party is armed to take suitable weapons for defence. **1954 Cr. L J 1710.**

Duration of right : The principle of Section 102 will apply in such a case and the right shall continue as long as the apprehension of danger, and not the danger itself, continues.

Second clause : The right of private defence of property against theft continues till (1) the offender has effected his retreat with the property, or (2) the assistance of public authorities is obtained, or (3) the property has been recovered. An offender is to be considered as having effected his retreat when he has once got off having escaped in mediate pursuit or pursuit not having been made. A recapture of the plundered property, while it is in course of being carried away, is authorised, for the taking and retaking is on transaction. But when the offence has been committed and the property removed, a recapture after an interval of time by the owner or by other persons on his behalf, however, justifiable, cannot be deemed an exercise of the right of defence of property. **P L D 1959 Lah. 987.**

In *Allah Bachayo v. The State*, **P L D 1964 Kar. 412**, the Court held that the clause "till property has been recovered" is to be read subject to the clause "till the offender has effected his retreat with the property".

Third clause : Since robbery involves theft, the right of private defence against theft may continue after the cessation of the right of private defence against robbery.

Fourth clause : Against criminal trespass the person in possession of the property has the right of private defence of property so long as the trespass continues and this right extends to causing to the trespassers any harm other than death subject to the restrictions mentioned in Section 99, namely, that no more harm should be inflicted than is necessary for the purpose of defence and that there is no time to have recourse to the protection of the authorities. If, in the exercise of this right, such resistance is offered by the trespassers that a reasonable apprehension is caused to the owners that death or grievous hurt would be the result, right of private defence of person then arises and extends to the causing of death. **22 Cr. L J 177.**

Fifth clause : The right of private defence against house-breaking continues only so long as the house-trespass continues, hence where a person followed a thief and killed him in the open, after the house-trespass had ceased it was *held* that he could not plead the right of private defence. **10 W R 9 (Cr.).**

106. Right of private defence against deadly assault when there is risk of harm to innocent person : If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Illustration

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

COMMENTS

Scope : This section permits harm being caused to innocent person if it is necessary in the exercise of the right of self-defence. But the risk of causing harm to innocent persons is permissible only when the defender has a reasonable apprehension of death and the right of self-defence cannot be effectively exercised without taking such risk.

Trial Court by summoning the Court-witnesses on the application of prosecution had acted beyond its jurisdiction in collecting evidence against the accused which was not collected or produced by the prosecution and had tried to fill in the lacunae in the prosecution case. Accused had no notice of his alleged dispossession from the land in dispute and he was justified in claiming to be in possession of the same on the day of occurrence. Trial Court had not believed the prosecution witnesses *qua* 11 accused out of 12 accused who had been acquitted. Ocular evidence which suffered from intrinsic inconsistencies was not free from taint and malice and was not corroborated by any independent evidence, not even by medical evidence and evidence of recoveries. Enmity between the parties was admitted. Prosecution had failed to prove its case beyond doubt and the accused was found entitled to the right of self-defence of person and property in the circumstances of the case. Accused was acquitted accordingly. **1996 PCr. LJ 1758.**

CHAPTER V

OF ABETMENT

107. Abetment of a thing : A person abets the doing of a thing, who--

First : Instigates any person to do that thing; or

Secondly : Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly : Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1 : A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procures a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z, B, knowing that fact and also that C is not Z, willfully represents to A that C is Z, and thereby intentionally cause A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2 : Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

COMMENTS

Stages in commission of crime : There are four stages in the commission of crimes:

- (1) Mental stage in which the crime is considered and determined upon;
- (2) Preparation;
- (3) Execution;
- (4) Concealment or profiting by crime.

Persons participating in stage (3) are principals. The offence of abetment, properly speaking is committed by those who take part either of stages in (1), (2) or (4).

But under the Penal Code abetment is limited to stages (1) and (2).

When an offence is committed and several persons take part in the commission of it, each person may contribute in a manner and degree different from the others, to the doing of the criminal act. Abetment is a separate and distinct offence provided the things abetted is an offence. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart or a distinct offence and not a mere minor offence within the meaning of Section 238, Cr.P.C. P L D 1961 Lah. 212.

As a general rule a charge of abetment fails if the substantive offence is not established against the principal. But there may be an exception where the substantive offence was undoubtedly committed, and there is evidence, such as a restricted confession by the abettor, on which the jury might have found, as against him, that the offence was committed by the principal, though, as against the latter, the confession would be insufficient for a conviction of murder.

Abetment is a substantive offence under Penal Code and not mere an appendage of principal offence. P L D 1968 Kar. 853.

The abetment is constituted in the following ways--

- (1) by instigating a person to commit an offence, **P L D 1958 Dacca 832**; or
- (2) by engaging in a conspiracy to commit it; or
- (3) by intentionally aiding a person to commit it.

First clause--(1) Abetment by instigation : A person is said to 'instigate' another to an act, where he actively suggests or stimulates him to the act by any means or language, direct, or indirect, whether it takes the form of express solicitation, or of hints, insinuation, or encouragement. The word 'instigate' means to goad or urge forward or to provoke, incite, urge or encourage to do an act. A mere intention or preparation or instigate is neither instigation nor abetment. Advice can become 'instigation' if it is meant actively to suggest or stimulate the commission of an offence. Advice *per se* cannot necessarily be instigation. A mere acquiescence, or permission does not amount to an instigation. Nor can deliberate absence from the scene of offence amount to instigation. Instigation implies knowledge of the criminality of an act. Where the accused approval of the conduct of certain persons who were maltreating a tenant for committing extortion and as a result of his suggestion that "the tenants ought to be beaten," blows were inflicted, it was *held* that the accused's remarks stimulated the commission of an offence and, therefore, his conviction under Section 330 and this section was proper. **A I R 1927 All. 730.**

Definition of Misrepresentation : 'Misrepresentation' means and includes :-

- (1) The positive assertion in a manner not warranted by the information of the person making it, or that which is not true, though he believes it to be true.
- (2) Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him.
- (3) Causing, however, innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Even if common intention is not borne out by facts, accused may be taken to be aiding one another in crime. **P L D 1955 Lah. 575.**

Explanation 1 : This section says that a person who--

- (1) by wilful misrepresentation, or
- (2) by wilful concealment of a material fact which he is bound to disclose, voluntarily causes, or procures or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

The illustration is an example of instigation by 'wilful misrepresentation'. Instigation by 'wilful concealment' is where some duty exists which obliges a person to disclose a fact. Mere failure to prevent the commission of an offence is not in itself an abetment where there is nothing to show that the accused instigated the commission of the offence or helped in any way to do it. **A I R 1941 Cal. 456.**

Approver M enjoying a special position under accused Z (former Primer Minister) in close and constant touch with him throughout his tenure of office; shown all kinds of favours and considerations by accused Z; he being not the only civilian official taken into custody on proclamation of Martial Law; having held important position involving assumption of responsibility and exercise of authority. In the circumstances it was *held* that it is difficult to hold M having become instrument in the hands of Martial Law authorities to deliberately and falsely concoct story narrated at great length at trial. **P L D 1979 S C 53.**

Cheating and its abetment may be tried at place where cheating takes place or consequence ensues. **P L D 1962 Kar. 499.**

The accused telephoned to W asking if he could have two boys for immoral purposes. No particular boys were named or indicated. The accused was charged with inciting W "to procure the commission by certain male unknown persons of acts of gross indecency with him" the accused. It was *held that* as the accused was inciting W to commit what, if he had done the acts, would have been a criminal offence, it was immaterial that the male persons who he was to procure were not at the time ascertained or that the accused was inciting W to incite another to commit an offence, and that the accused was rightly convicted. Incitement amounts to abetment. **P L D 1959 Dacca 832.**

By suggestion : Where the accused expressed approval of the conduct of certain persons who were maltreating a tenant for committing extortion as and a result of his suggestion that the tenant ought to be beaten blows were inflicted. It was *held that* the accused's remarks stimulated the commission of the offence. After detailed and anxious consideration of criticism levelled by learned counsel against approver and the evidence given by him at the trial, I have reached the conclusion that the statement made by him is not such as can be said to be lacking in intrinsic worth by reason of any inherent weakness, or suffering from infirmities like omissions, contradictions, improvements and lies, etc., on the contrary it is highly probable considering the peculiar position occupied by approver under appellant, and can be safely acted upon provided the requisite corroboration is available on the record. It will be useful to state here, that, on an exhaustive review of the general circumstances pertaining to approver, I have already found that considering the fact that he enjoyed a special position under appellant that he was in close and constant touch with him throughout his tenure that he was shown all kinds of favours and considerations by being sent abroad for official visits and medical treatment, that he was not the only civilian official taken into custody on the proclamation of Martial Law, and that during his long career in the police service of Pakistan he had held important positions involving assumption of responsibility and exercise of authority, and it was, therefore difficult to hold that approver had become an instrument in the hands of the Martial Law authorities to deliberately and falsely concoct the story he had narrated at such length at the trial. A further significant fact strengthening me in this conclusion was that even if he was pressurised to falsely implicate the applicant there was no reason for the Martial Law authorities, or for approver himself to falsely assign an important operational role in the conspiracy to co-appellant who was then functioning as one of the Directors of the Federal Security Force, incharge of Operations and Intelligence. **P L D 1979 S C 215.**

Second clause--Abetment by conspiracy : 'Conspiracy' consists in a combination and agreement by persons to do some illegal act or to effect a legal purpose by illegal means. So long as such a design rests intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum* capable of being enforced, if lawful, is punishable if for a criminal object or for use of criminal means. It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed. Where parties concert together, and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the common plan is the act of the whole.

Forgery : To prepare, in conjunction with others, a copy of an intended false document, and to buy a stamped paper for the purpose of writing such false document, and to ask for information as to a fact to be inserted in such document, are facts which would support a conviction for abetment of forgery as being acts done to facilitate the commission of the offence.

Third clause--Abetment by aid--(a) By an act : A person abets by aiding, when by any act done either prior to, or as the time of, the commission of the act, he intends to facilitate and does in fact facilitate, the commission thereof (*vide Explanation 2*). For instance, the supplying of necessary food to a person known to be engaged in crime is not *per se* criminal but if food were supplied in order that the criminal might go on a journey to the intended scene of the crime or conceal himself while waiting for an opportunity to commit the crime, the

supplying of food would be in order to facilitate the commission of the crime and might facilitate it. Mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. To be present and aware that an offence is about to be committed does not constitute abetment unless the person thus present holds some position or rank or influence such that his countenancing what takes place may, under the circumstances, be held a direct encouragement, or unless some specific duty of prevention rests on him, which he leaves unfulfilled in such way that he may be safely taken as having joined in conspiracy for the perpetration of the offence. **Cr. R No. 51 of 1886.**

Acceptance of unstamped receipt not aiding : Where a debtor paid a sum of money to his creditor, and asked for a stamped receipt from him, who had not at hand a stamp and then accepted an unstamped receipt saying he would affix a stamp thereto, which he did not do, it was held that this did not constitute abetment of the offence of giving an unstamped receipt because he had done or committed nothing which it was in his power to effect. **I L R 8 All. 18.**

Abetment by giving bribe : When considering whether the bribe given is guilty of abetment, the definition of abetment given in the section will have to be construed alongwith illustration (a) to Section 109. Section 165-B is only a special exemption in favour of bribe-giver in absolving him from liability but bribe-giver is an abettor notwithstanding that bribe was paid under threat. **P L D 1964 S C 266.**

Element of criminality must be clearly spelt out before a person is indicted for abetment. **1995 P Cr. L J 1424.**

Constitutional petition : Summoning a person as an accused after challan was filed in Court on the charge of abetting offence. Petitioner who was alleged to have been involved in commission of crime, was found innocent by police after thorough investigation, but despite that petitioner was summoned by Trial Court on application of prosecution witness. Prosecution witness on whose request petitioner was summoned, had nowhere stated that offence was committed with abetment of petitioner, but had simply stated that petitioner once had come to his house alongwith accused persons and had threateningly asked him to divorce his second wife. Whatever be the nature of crime, nobody could be put to rigours and agony of criminal trial on a mere statement of one of prosecution witnesses that a named person had come to his house in the company of others and had threatened him. There must be cogent evidence spelling out the ingredients of abetment as defined in Section 107, P.P.C. Order summoning petitioner which was not supported by any material on file and was passed by Trial Court without application of independent mind, was liable to be struck down and could not be sustained. **1996 P Cr. L J 1673.**

Sections 34 and 107 : It would be evident from the plain reading of Sections 34 and 107, P.P.C. that they are quite distinct and separate in their intent and scope. Section 34 enunciates the principle of constructive liability in regard to an act committed by several persons in furtherance of their common intention. Whereas Section 107 defines the offence of abetment, whose mode of punishment is elaborated in Sections 109 to 120, P.P.C. The basic differences between the two provisions is highlighted by Explanations 2 and 3 to Section 108 which define an abettor. It becomes abundantly clear that the actual commission of the abetted act is not a *sine qua non* of the offence of abetment nor so is the guilty intention or knowledge of the person abetted or its community with the abettor. The distinction between abetment as defined in Section 107, P.P.C. and constructive liability under Section 34, P.P.C. lies in this, that under the former an offender can be convicted for the offence which he actually abets regardless of the ultimate result achieved whereas under Section 34 all the persons accused of the offence are in the eyes of law united in their intention in carrying out of the actual act committed in furtherance of their common intention. It is well established that common intention though not shared at an earlier stage could still be formed at the spur of the moment in the circumstances of a given case. **P L D 1971 Lah. 959.**

108. Abettor : A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1 : The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2 : To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Illustrations

(a) A instigates B to murder C, B refuses to do so. A is guilty of abetting B to commit murder.

(b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3 : It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor or any guilty intention or knowledge.

Illustrations

(a) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby, cause Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(c) A instigates B to set fire to a dwelling-house, B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(d) A intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4 : The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Illustration

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5 : It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.

Illustration

A concerts with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C mentioning that a third person to administer the poison, but without mentioning A's name. C agrees to procure the poison and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has, therefore, committed the offence defined in this section and is liable to the punishment for murder.

COMMENTS

Scope : This section defines an 'abettor' whereas the last preceding section defines the abetment of act. Abetment involves active complicity on the part of the abettor at a point of time prior to the actual commission of the offence, and it is of the essence of the crime of abetment that the abettor should substantially assist the principal culprit towards the commission of the offence. Nowhere concurrence in the criminal acts of another without such participation therein as helps to effect the criminal act or purpose, is punishable under the Code.

Abettor, under this section means the person who abet:

- (a) the commission of an offence, or
- (b) the commission of an act which would be an offence if committed by a person not suffering from any physical or mental incapacity.

In the light of the preceding section he must be an instigator or a conspirator of an intentional helper.

There must be abetment of the commission of an act. The section does not contemplate any acts of subsequent abetment. Thus a person cannot be convicted of abetment of a false charge solely on the ground of his having given evidence in support of such charge.

In order to convict a person of abetting the commission of a crime it is not only necessary to prove that he has taken part in those steps of the transaction, which are innocent, but in some way or other it is absolutely necessary to connect him with those steps of the transaction which are criminal.

Explanation 1 : The abetment of the illegal commission : If a public servant is guilty of an illegal omission of duty made punishable by the Code, and a private person instigates him, then he abets the offence of which such public servant is guilty, though the abettor, being a private person, could not himself have been guilty of that offence.

Explanation 2 : Effect of requisite to constitute the offence may or may not be caused : The offence of abetment is complete notwithstanding that the person abetted refuses to do the thing, or fails involuntarily in doing it, or does it, and the expected result does not follow. The offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act which is actually done by the person whom he abets. 1970 P Cr.L J 1172.

Explanation 3 : Person not suffering from a physical or mental incapacity : This Explanation makes it clear that the person abetted need not have guilty intention in committing the act abetted. It makes no difference in the guilt of the abettor when the agent carries out the desired effect under a mistaken belief that the act which he is employed to do is an innocent act. The section applies to abetment generally and there is nothing to indicate that it applies only to abetment by instigation and not to other kinds of abetment. If a man does, by means of an innocent agent, an act which amounts to crime, the employer, and not the agent is guilty of the act. Illustrations (b), (c) and (d) exemplify this Explanation.

The words "when the abetment of an offence is an offence", do not mean "when the abetment of an offence is actually committed". They mean when the abetment of an offence is by definition or description an offence under the Penal Code.

Explanation 4 : Abetment of an abetment : According to this explanation a person may make himself an abettor by the intervention of a third person, without any direct communication between himself and the person employed to do the thing.

Where S instigated K, a bench clerk of a Magistrate M, to instigate M to accept an illegal gratification for acquitting an accused in a case pending before him, K received such gratification as a police spy, and intending to get S arrested, and did not in fact instigate M to accept the same, it was held that S was guilty of the abetment of bribery under Section 161 read with Section 116.

Under Explanation 4 when the abetment of an offence is an offence, the abetment of such abetment is also an offence. The words "when the abetment of an offence is offence" do not mean when an abetment of an offence is actually committed. The words mean when the abetment of an offence is punishable under Section 109 or 116 or some other provisions of the Code.

Where the act urged upon or abetted was not criminal initially, it was held that the abettor could not be penalised for a different offence committed by the person abetted. 1970 P Cr. L J 766.

Likewise where the accused was seen assisting the principal accused in commission of an alleged offence which itself constituted no offence the accused was held to have committed no offence. 1970 P Cr. L J 1172.

Explanation 5 : Abettor's concert not necessary : This explanation applies to abetment by conspiracy. It is not necessary that all persons joining in any conspiracy must be aware of every secret or every minute detail. When the number of persons conspiring to do a particular act is very large there will be a few amongst them who will plot and plan, and though the others are not fully cognizant of all facts yet their liability is not at all lessened.

The offence of abetment is a substantive one, and the conviction of an abettor is, therefore, in no way dependent on the conviction of the principal. A person who has been convicted of an offence as a principal cannot also be punished as an abettor.

[108-A. Abetment in Pakistan of offences outside it : A person abets an offence within the meaning of this Code who, in Pakistan, abets the commission of any act without and beyond Pakistan which would constitute an offence committed in Pakistan.]

Illustration

A, in Pakistan, instigates B, a foreigner in Goa, to commit a murder in Goa, A is guilty of abetting murder.

COMMENTS

Scope : This section contemplates that the abetment committed outside Pakistan shall be counted as committed in Pakistan. If the act committed in Pakistan amounts to preparation only, it will not be punishable.

This section applies only to offences under the Penal Code and not to offences under other statutes.

109. Punishment of abetment if the Act abetted committed in consequence and where no express provision is made for its punishment : Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence:

¹[Provided that, except in case of *Ikrah-i-Tam* (اکراه تام), the abettor of an offence referred to in Chapter XVI shall be liable to punishment of *ta'zir* specified for such offence including death.]

Explanation : An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustration

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in Section 161.

(b) A instigates B to give false evidence. B, in consequence of the instigation commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(c) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

COMMENTS

Scope : Under this section punishment for an abetment has been prescribed. It has been laid down that the abettor is liable for the same punishment which is prescribed for the offence, the commission of which was abetted. It says if the act abetted is committed in consequence of the offence and specifically no express provision has been made by this code for the punishment of such abetment, the abettor be punished with the punishment provided for the offence, the commission of which is abetted. It has been made clear that the offence is said to be committed in consequence of abetment when the act is committed either in consequence of the instigation or in pursuance of the conspiracy or with the aid which constitutes the abetment.

Where an accused, a steno-typist, initialling admission form for examination and thus induced his superior officer to accord attestation as to correctness of entries. Accused make his officer believe that photograph was that of real candidate for examination. Admission form

1. Proviso added by the Criminal Law (Amendment) Act, II of 1997.

thus attested was a valuable document. The accused committed an act of criminal misconduct within the definition of Section 5(1)(d), Prevention of Corruption Act. Offences of personation and forgery were hence abetted by him in his capacity as public servant. Attesting officer though not having it as his duty to attest admission form yet enjoyed such privilege being a Gazetted Officer. The accused accordingly, by initialling form also acted in discharge of his official duties as a steno-typist and trial by Special Judge, held not without jurisdiction. **P L D 1977 Lah. 1430.**

Abettor cannot be held guilty unless the result likely to follow or expected to follow from the act abetted and as such this foreseeable. **P L D 1979 S C 53.**

Abetment of murder committed by principal accused; contention that aiding accused acted in order to defend and save principal accused and caught hold of deceased so as to prevent him from attacking and harming principal accused and therefore their action did not constitute an offence. The contention was repelled holding that action of aiding accused was one of aiding their principal accused in fatally injuring deceased inasmuch as when principal accused took out dagger from his *dab* and stabbed deceased they could have left him and stopped principal accused from proceeding to inflict fatal blows upon deceased. It was further held that aiding accused were liable for abetment of offence committed by principal accused as envisaged by Section 109. **N L R 1980 Criminal 499.**

Prosecution evidence did not show as to how the accused were connected with the main accused although their presence at the time of occurrence was shown when main accused and his companions had forced down the abductee from the tonga and taken her away on the motor-cycle. Prosecution witnesses had improved their statements before the Court by attributing to accused role of aiming arms at the persons attracted to the spot. Offence of abduction with the necessary intent punishable under Section 11 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was, therefore, not established on record beyond reasonable doubt. Statement of abductee alone that the accused had kept watch at the time of her being subjected to Zina-bil-Jabr by main accused was also an improvement made by her at the trial stage which could not be made basis for conviction under Section 109, P.P.C. read with Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Accused were acquitted in circumstances. **1996 P Cr. L J 1794.**

Commission of offence of abetment : Abettor should be present at time of commission of offence or prior to its commission, he should be shown to be engaged in conspiracy in pursuance to which offence was committed. Charge under Sections 302, 365-A & 109 on basis of sole testimony of a witness and in absence of any evidence of conspiracy by accused with dacoits to cause murder of abductee, would be groundless and conviction/death sentence recorded on such charge would be illegal. **N L R 1996 Cr. L J 123; P L J 1996 Cr.C. 12.**

Offence of Zina (Enforcement of Hudood) Ordinance, 1979 : Accused had neither exhorted the principal accused to commit Zina with the victim nor had helped him in catching or holding her to facilitate commission of Zina, rather she had categorically stated that they had not even touched her during the occurrence. Accused were not shown to have gone with the knowledge that the principal accused would commit Zina with the victim, nor they had played any active role in that regard. Prosecution case against accused about abetment of commission of Zina in the circumstances, being doubtful, they were acquitted of the said charge. **1998 M L D 1039.**

Quashing of F.I.R. : Accused/petitioners through Constitutional petition had sought quashing of F.I.R. registered against them contending that female accused/petitioner had

contracted marriage with male accused/petitioner of her own consent and she being a *sui juris* had filed suit for jactitation of marriage against the person who claimed to be her husband. Complainant who was father of female accused/petitioner had alleged in F.I.R. that male accused/petitioner had abducted/enticed away his daughter/female accused/petitioner aged 16/17 years from his house in the absence of family members. Questions of serious controversy were involved regarding existence of earlier marriage of female accused/petitioner which could not be decided summarily but could be decided only after proper and thorough investigation. Such question of fact requiring inquiry/investigation, F.I.R., could not be quashed summarily. Allegation of *mala fides* in registration of case also could not be properly and judiciously assessed because investigation was yet to be made and evidence was yet to be recorded. Matter in dispute only could be resolved after parties had adduced their respective evidence. Constitutional petition filed by accused/petitioners having no merits was dismissed. **1998 M L D 1199.**

Bail, grant of : F.I.R. suffered from an unexplained delay of four months. Co-accused had been declared innocent by the Investigating Agency. F.I.R. showed that the abductee had gone away with her free will and after recovery had deposed against the accused in her statement under Section 164, Cr.P.C. Case against accused in circumstances needed further inquiry and he was admitted to bail accordingly. **1995 PCr. LJ 968.**

Sections 109 and 111--Difference stated : Unlike the proviso to Section 111, P.P.C., in which the expressions "probable consequence of the abetment" and "the act done or committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment appear, and will have to be given their proper meaning, there is no such requirement in Section 109, P.P.C. Furthermore, Section 109, P.P.C. is obviously a residuary section whereas Section 111, P.P.C., is a special section applicable only to the facts of the case of a certain kind. Section 109, P.P.C. from its language contemplates the abetted act to have been completed that is, if murder instigated and the victim is killed, only then it provides for the punishment of such abetment but only when there is no other specific provision in this behalf; whereas Section 111 deals with the different acts having been committed as a probable consequence of abetment. The different acts in Section 111 would include an offence under Section 301, P.P.C. or for that matter any other section of the Penal Code. The distinction thus is apparent between the two sections. In one the abetted act is completed and in the other a different act is committed as a probable consequence of abetment; and where the Code provides a specific penal provision for dealing with a situation where a different act is committed, Section 109 will have no application; for, that is a residuary provision. It is Section 111 which will be applicable. **P L D 1979 S C 53.**

110. Punishment of abetment if person abetted does act with different intention from that of abettor : Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with intention or knowledge of the abettor and with no other.

COMMENTS

Scope : This section says that though the person abetted commits the offence with a different intention or knowledge yet the abettor will be punished with the punishment provided for the offence abetted. The liability of the person abetted is not affected by this section.

Explanation 3 to Section 108 bears relation to this section. [See ill. (d) to Section 108].

Under Section 108 and this section a person may be guilty of abetment although the person abetted may not be capable by law of committing the offence or has not the same guilty intention or knowledge as that of the abettor.

Procedure : Same as that for the offence abetted.

111. Liability of abettor when one act abetted and different act done : When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:

Proviso : Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Illustrations

(a) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner and to the same extent as if he had instigated the child to put the poison into the food of Y.

(b) A instigates B to burn Z's house. B sets fire to the house and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft; for the theft was a distinct act, and not a probable consequence of the burning.

(c) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable consequence of the abetment, A is liable to the punishment provided for murder.

COMMENTS

Under this section if an act is abetted by a person and the person abetted does a different act, the abettor is liable for his act of abetment in the same manner and to the same extent as if he had directly abetted the act done by the person abetted provided that (1) the act done was a probable consequence of the abetment, and (2) the act was committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment. **42 Bom. L R 205.**

This section proceeds on the maxim "every man is presumed to intend the natural consequences of his act". If one man instigates another to perpetrate a particular crime, and that other, in pursuance of such instigation, not only perpetrates that crime, but in the course of doing so, commits another crime in furtherance of it, the former is criminally responsible as an abettor in respect of such last-mentioned crime, if it is one which, as reasonable man, he must, at the time of the instigation, have known would, in the ordinary course of things, probably have to be committed in order to carry out the original crime. **1 L R 6 All. 491.**

The appellant handed over his *dao* (tree tapping weapon) to his son and directed him to strike one of the complainant party, the blow on the neck of the deceased inflicted by the son caused his death. In the circumstances it was held that the appellants were entitled to the right of private defence of property and the direction to strike could not amount to an offence, because an injury short of death, caused by them would be protected and lawful. Appellants making over the trees tapping *dao* to his son with a direction merely to strike, in the circumstances could not constitute abetment of an unlawful or criminal act. The appellant was not liable under Section 111 for what he did and he could not be held responsible for what his son did in excess of his direction which was obviously within the limits of law and protected by the right of private defence of property. **1970 P Cr. L J 776.**

Section 301, P.P.C. applied only to actual killer and not to abettor. Abettors in such case are governed by Section 111. **P L D 1979 S C 53.**

Probable consequences : A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such act; an unusual or unexpected consequence cannot be described as a probable one. When the act done is different from the act instigated, an abettor is only liable for such different act if it was a likely consequence of the instigation or if it was an act which, the instigator could reasonably have been expected to foresee might be committed as a result of the instigation. **I L R 57 All. 717.**

Actual killer is liable under Section 301, Penal Code (XLV of 1860) by killing another person instead of one intended to be killed. Person abetting murder of person intended to be killed is likewise liable for offence under Section 301 read with Sections 111 and 109, P.P.C. if another person killed. **P L D 1978 Lah. 523.**

The section applies when the abettor is not actually present at the scene of the crime. If he is present, Section 114 comes into operation. The section refers to the abetment of a criminal act and not to the abetment of an act, which is not criminal. Peaceful picketing is not an offence, but it becomes an offence if it is carried on by criminal means. Therefore, advocating picketing cannot be held to be a lawful act merely because picketing can be done lawfully. Whether the accused advocated peaceful picketing or picketing involving acts of violence is a question of fact and in considering the accused's intention the surrounding circumstances and subsequent events may be looked into. **A I R 1931 Pat. 52.**

In a case where a person is ordered to kill another and in pursuance of that command he aims at him, but by mistake another person is killed, the case falls under the mischief of Section 111, P.P.C. as the killing of the person other than commanded can be deemed to be a probable consequence of the order given. **P L D 1979 S C 53.**

112. Abettor when liable to cumulative punishment for act abetted and for act done : If the act for which the abettor is liable under the last preceding section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Illustration

A instigates B to resist by force a distress made by a public servant, B in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and: if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress A will also be liable to punishment for each of the offences.

113. Liability of abettor for an effect caused by the act abetted different from that intended by the abettor : When an act is abetted with the intention on the part of the abettor of causing a particular effect and an act for which the abettor is liable in consequence of the abetment, causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Illustration

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

COMMENTS

Scope : Section 111 provides for the doing of an act different from the one abetted, whereas this section deals with the case where the act done is the same as the act abetted but its effect is different. To make the abettor liable it must be shown that he knew that the act abetted was likely to cause that effect. This can be done by showing that a reasonable man would draw an inference that a particular effect was likely to ensue from a particular act. For instance *B* beats *C* indiscriminately with a heavy stick. He must be presumed to know that he was likely to cause *C*'s death. If *C*'s death is caused, *B* must be presumed to have intended to cause *C*'s death. *A*, who abetted the act and helped *B* in the attack is also guilty. **A I R 1930 Nag. 78.**

114. Abettor present when offence is committed : Whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

COMMENTS

Principle : The meaning of this section that a person abetting an offence is to be deemed to have committed the offence though he does not, in fact, do so any more than a principal in the second degree does. Where, for instance, a blow is struck by *A*, in the presence of and by the order of *B*, both are principals in the transaction. If two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was. If *A* instigates *B* to murder *Z*, he commits abetment; if absent, he is punishable as an abettor, and if the offence is committed, then under Section 109; if present, he is by this section deemed to have committed the offence and is punishable as a principal. Person shouting *lalkara* can be guilty of abetment. **P L D 1967 S C 340.**

Provision contained in Section 114 is evidentiary and not punitive nor wide enough include all accessories of fact. **P L D 1971 Lah. 967.** Because participation *de facto* may sometimes be obscure in detail, it is established by the presumption *juris de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by Section 114 brings the case within the ambit of Section 34. Thus suppose *A* meets his death as the result of a blow struck by *B*, *C* is present, but it is not clear what, if any act was done by him. If any previous act or omission by *C* is proved which would amount to abetment of the killing of *A* by *B*, the Court is bound to presume that *C* was a participant within the meaning of Section 34.

Present : The word "present" has been used in its legal and not literal sense as meaning sufficiently near to render assistance, but mere presence as an abettor of any person will not render him liable for the offence committed. **I L R 27 Cal. 566.** There must be a participation in the act. It is not necessary that the party should be actually present, ear or eye-witness of the transaction: he is in construction of law, present, aiding and abetting, if with the intention of giving assistance, he be near enough to afford it, should occasion arise. Presence during the whole of the transaction is not necessary. For instance if several persons combine to forge an instrument, and each executes, by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. *A* conspirator, who, while his friends entered in a house and looted it stood and watched outside in pursuance of the common design, was held not to escape liability under the section.

Sections 34 and 114 : Section 34 enunciates the principle of constructive liability in regard to an act committed by several persons in furtherance of their common intention, and all the persons accused of the offence are in the eye of law united in their intention in carrying out of the actual act committed in furtherance of their common intention. Whereas the provision contained in Section 144, P.P.C. is rather evidentiary and not punitive. Once an abettor is personally found to be present at the spot then he is liable as principal but would be punished only once and to that extent there remains little difference between an abettor personally present as envisaged by Section 114, P.P.C. and a co-accused sharing community of intention as contemplated by Section 34, P.P.C. It is well established that common intention though not shared at an earlier stage could still be formed at the spur of the moment in the circumstances of a given case. **P L D 1971 Lah. 959.**

115. Abetment of offence punishable with death or imprisonment for life if offence not committed : Whoever abets the commission of an offence punishable with death or imprisonment for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

If act causing harm be done in consequence : And if any act for which the abettor is liable in consequence of the abetment, and which cause hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Illustration

A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or transportation for life. Therefore A is liable to imprisonment for a term which may extend to seven years and also to a fine; and if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

COMMENTS

Scope : The section contains two parts. The first part prescribes punishment for such offence if the offence which had been abetted has not been committed and there is no express provision therefore in the Code. The second part prescribes punishment for that offence of abetment in consequence of which hurt is caused to any person.

Abetment under this section need not necessarily be abetment of the commission of an offence by a particular person against a particular person.

Three different states of act may arise after an abetment:

- (1) No offence may be committed. In this case the offender is punishable under this section or Section 116 for the mere abetment to commit a crime.
- (2) The very act at which the abetment aims may be committed, and will be punishable under Sections 109 and 110.

- (3) Some act different, but naturally flowing from the act abetted may be perpetrated, in which case the instigator will fall under the penalties of Sections 111, 112 and 113.

116. Abetment of offence punishable with imprisonment--if offence be not committed : Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which may extend to one-fourth part of the longest term provided for that offence; or with such fine as is provided for that offence; or with both.

If abettor or person abetted be a public servant whose duty it is to prevent offence : And if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.

(b) A instigates B to give false evidence. Here, if B does not give false evidence A has nevertheless committed the offence defined in this section, and is punishable accordingly.

(c) A, police-officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(d) B abets the commission of a robbery by H, a police-officer, whose duty it is to prevent that offence. Here though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

COMMENTS

Scope : This section provides for the abetment of offence punishable with imprisonment. There is no corresponding provision in the Code relating to abetment of an offence punishable with fine only.

A person who pays a gratification to a public servant, who does not himself commit an offence under Section 161, is guilty of an offence under Sections 116 and 161. If he only offers to pay such gratification he is punishable under Sections 116, 161 and 511. Where S instigated K, a clerk in the Court of M, a Magistrate, to instigate the latter to accept an illegal gratification for acquitting an accused in a case pending before him and granting sanction against the complainant in the case, and K received such gratification and did not in fact instigate M to accept the same, it was held that S was guilty of the abetment of bribery under Section 161 read with this section.

Person instigates the Government Officer to accept his offer to defraud Government. His action amounts to abetment. 1972 S C M R 255.

The convict-petitioner was not alleged to have offered any valuable thing without consideration to a public servant but was alleged to have attempted to pay hard cash to wife of a public servant (Chairman, Disqualification Tribunal). Section 165, P.P.C. was not attracted to facts of the case. Convict having not paid or attempted to pay any illegal gratification direct to a public servant, Section 161, P.P.C. also was not applicable, the convict in facts and circumstances of case, attempted to abet acceptance of illegal gratification by wife of public servant with a view to inducing her by such corrupt or illegal means, or by personal influence, to induce her husband, a public servant, to show favour to convict in exercise of his official functions and therefore his case fell under Section 163, P.P.C. Convict having only attempted to abet offence under Section 163 and such offence being not committed, *held*, liable under Section 116, P.P.C. to 1/4th of maximum sentence prescribed under Section 163. **P L D 1979 Lah. 226.**

117. Abetting commission of offence by the public or by more than ten persons : Whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustration

A affixes in a public place a placard instigating a sect consisting of more than ten members to meet at a certain time and place, for the purpose of attacking the members of an adverse sect, while engaged in a procession. A has committed the offence defined in this section.

COMMENTS

Scope : This section is a general provision for abetment of any number of persons exceeding ten. When more than ten persons are instigated to commit an offence punishable with death, the offence clearly comes under Section 115 as well as this section. The view of the Lahore High Court is that Section 115 applies only when the abetment is not punishable under any other provision of the Code and that where Section 117 is applicable, the offence will not fall under Section 115. **A I R 1933 Lah. 128 (1).** This view has been dissented from by the Bombay High Court which has *held that* Section 117 is not an express provision for abetment of an offence punishable with death or imprisonment for life. **A I R 1939 Bom. 452.**

Mere presiding at a meeting at which songs, criminally offensive, were sung in the presence of the President, was not to make the President liable for abetment, in the absence of evidence that he positively encouraged the singer or persuaded him to sing the particular songs or was a party to an agreement for singing them or specifically accorded permission to the singer to sing them. **A I R 1932 Cal. 549.**

Mere knowledge of person about existence of bad blood between the two parties, does not lead to conclusion that such person knew that one of the parties intended to commit murder. **P L D 1962 Kar. 873.**

118. Concealing design to commit offence punishable with death or imprisonment for life if offence be committed : Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with death or imprisonment of life,

voluntarily conceals by any act or illegal omission, the existence of design to commit such offence or makes any representation which he knows to be false respecting such design,

if offence be not committed : Shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or, if the offence be not committed, with imprisonment of either description for a term which may extend to three years; and in either case shall also be liable to fine.

Illustration

A, knowing that dacoity is about to be committed at B, falsely inform the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this section.

COMMENTS

These sections apply to the concealment of all offences except those which are merely punishable with fine. They deal with concealment prior to the commission of an offence. Sections 202 and 203 deal with subsequent concealment.

Under Section 107 concealment of a design to commit an offence constitutes an abetment. There must be an obligation on the person concealing the offence to disclose it. The concealment to be criminal must be intentional or at least with knowledge that it will facilitate the commission of an offence.

119. Public servant concealing design to commit offence which it is his duty to prevent : Whoever, being a public servant intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence which it is his duty as such public servant to prevent,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design;

if offence be committed : shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both;

if offence be punishable with death, etc. : or, if the offence be punishable with death or imprisonment for life with imprisonment of either description for a term which may extend to ten years;

if offence be not committed : or, if the offence be not committed, shall be punished with imprisonment of any description provided for the offence for a term which may extend to one-fourth part of the longest term of such imprisonment or with such fine as is provided for the offence, or with both.

Illustration

A, an officer of police, being legally bound to give information of all design as to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here A has by an illegal omission concealed the existence of B's design, and is liable to punishment according to the provisions of this section.

COMMENTS

Scope : This section extends the principle laid down in the last section to public servants and prescribes an enhanced punishment. A, a police officer and as such under a legal obligation to give information of all design to commit robbery and knowing that Z intends to commit a robbery illegally omits to give information about Z's intention, knowing that this is likely to facilitate robbery. A has abetted robbery and will be guilty of an offence under this section.

120. Concealing design to commit offence punishable with imprisonment : Whoever, intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment,

voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design;

if offence be committed; if offence be not committed : Shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth, of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

COMMENTS

Scope : Section 118 deals with offences punishable with death or imprisonment for life; this section deals with offences punishable with imprisonment. The basic principle in both the sections is one and the same. All offences except those punishable only with fine are included in these two sections.

The illegal concealment by act or omission contemplated by this section has reference to the existence of a design on the part of third persons to commit an offence.

CRIMINAL CONSPIRACY

The offence of criminal conspiracy is a substantive offence and is punishable as such. It has nothing to do with abetment although, conspiracy is one of the ways by which offence of abetment may be committed.

To some extent conspiracy resembles "common intention" defined in Section 34. In both, everybody is equally liable. But there is some difference as well. In conspiracy, it is the bare engagement and association that completes the offence even though the illegal act does not necessarily follow whereas in Section 34 there must be actual commission of some criminal act in furtherance of common intention of all and then only everybody will be liable even if the act was done by one alone. Conspiracy differs from other offences inasmuch as in other offences the intention to do a criminal act is not a crime unless something is actually done while in conspiracy, even an agreement to do an illegal act becomes an offence.

This Chapter has only two sections. Section 120-A defines criminal conspiracy and Section 120-B provides for the punishment of criminal conspiracy.

120-A. Definition of criminal conspiracy : When two or more persons agree to do, or cause to be done,--

- (1) an illegal act, or
- (2) an act which is not illegal by illegal means such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation : It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

COMMENTS

Scope : This section provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of Section 107. Where a criminal conspiracy amounts to an abetment under Section 107, it is unnecessary to invoke the provisions of this section or Section 120-B, because the Code has made specific provision for the punishment of such a conspiracy. **I L R 15 Pat. 26.**

To constitute a criminal conspiracy there must be an agreement of two or more persons to do an act which was illegal or which was to be done by illegal means. **1998 P Cr. L J 1486.**

Ingredient : The essential ingredients of this offence are :--

- (1) That there should be an agreement between the persons who are alleged to conspire; and
- (2) That the agreement should be--
 - (i) for doing of an illegal act, or
 - (ii) for doing by illegal means an act which may not itself be illegal. **A I R 1926 Sind 174.**

Offence of conspiracy completed as soon as agreement to do an illegal act is arrived at. Agreement may be express or implied, or partly express and partly implied and could be

1. Chapter V-A ins. by the Criminal Law (Amendment) Act, VIII of 1913.

reached in one or several sittings. No express agreement need be proved and agreement can be implied by subsequent conduct, by acts done, by anything said, and/or by any one of such persons or from facts and circumstances indicating, when taken together, as being part of some complete whole. Direct evidence is seldom available with regard to conspiracy a matter is one of inference from sequence of circumstances. **P L D 1978 Lah. 523.**

Conspiracy differs from other offences in this respect, that in other offences the intention to do a criminal act is not a crime of itself until something is done amounting to the doing or the attempting to do some act to carry out the intention; conspiracy, on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether it is done or not **P L D 1957 S C (Ind.) 68.**

Offence of criminal conspiracy consists in mere agreement between two or more persons to do an illegal act or an act not illegal by illegal means. Conspiracy consists not merely in intention of two or more persons but in agreement of two or more persons to do an illegal act or to do a legal act by illegal means. Design as long as resting in intention only is not indictable. No agreement, except an agreement to commit an offence, amounts to criminal conspiracy unless some overt act, besides agreement, is done in pursuance of conspiracy. **P L D 1979 S C 53.**

Difference between Criminal conspiracy and common intention : To some extent conspiracy resembles common intention. In both, every person is liable equally. But there is some difference as well as offence of criminal conspiracy is a substantive offence whereas 'common intention' is only a rule of evidence. In conspiracy bare agreement is punishable whereas there must be some overt act and participation in action for liability of sharing common intention under Section 34. In conspiracy offence may follow or not, but for applicability of Section 34, the offence must follow.

Difference between Criminal conspiracy and abetment : Conspiracy to commit an offence is itself an offence. There may be some element of abetment in conspiracy but it is something more than abetment. In abetment a mere agreement between the persons is not enough. An act or illegal omission must take place in pursuance of the conspiracy. In conspiracy the mere agreement is enough.

Conspiracy is one of the forms of abetment and it makes no difference that conspiracy by way of abetment requires an overt act, whereas conspiracy under Section 120-A, P.P.C. to commit the illegal act requires no overt act. Abetment is just as much a substantive offence as is conspiracy under Section 120-A, Pakistan Penal Code. **P L D 1956 Kar. 395.**

To constitute a criminal conspiracy there must be an agreement of two or more persons to do an act which is illegal or which is to be done by illegal means. The object in view or the methods employed should be illegal, as defined in Section 43, *supra*. A distinction is drawn between an agreement to commit an offence, and an agreement of which either the object or the methods employed are illegal but do not constitute an offence. In the case of the former, the criminal conspiracy is completed by the act of agreement; in the case of the latter, there must be some act done by one or more of the parties to the agreement to effect the object thereof, that is, there must be an overt act.

Mode of proof : Conspiracy may be established by direct or indirect evidence such as circumstantial evidence. Evidence not to be considered in isolation as so many bits of evidence but whole of evidence to be considered together and its cumulative effect to be weighed and given effect. **P L D 1979 S C 53.**

Offence of criminal conspiracy is a substantive offence by itself. Question whether *actus reus* is executed or not is not material. Offence committed in course of performance of unlawful act becomes responsibility of initial conspirators as abettors. **P L D 1978 Lah. 523.**

Criminal conspiracy may come into existence, and may persist and will persist so long as the persons constituting the conspiracy remain in agreement and so long as they are acting

in accord in furtherance of the objects for which they entered into the agreement. Conspiracy is to be inferred from circumstances and need not be directly proved. **P L D 1967 Lah. 1190.**

Consent : In the Dictionary of English Law by Earl Jowitt the word 'consent' which is an essential ingredient of an "agreement", has been defined to mean "an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil of either side. Consent presupposes three things a physical power, a mental power, and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind. **P L D 1979 S C 53.**

Proviso : The section has one proviso as well and that is very important. It says that when an agreement is not for commission of an offence, an overt act in pursuance of the conspiracy is necessary to constitute criminal conspiracy. Thus an agreement becomes a criminal conspiracy only if it relates to the commission of some offence otherwise mere agreement will not be sufficient unless some overt act is also done in pursuance of the agreement.

Explanation : The explanation attached to this section lays down that it is immaterial whether the illegal act is the ultimate object of the agreement or is merely incidental to that object.

120-B. Punishment of criminal conspiracy : (1) Who ever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.

COMMENTS

Scope : This section is a penal section and has provided for the punishment for conspiracy definition of which has been given in the last preceding section. It says that the offence of criminal conspiracy shall be punished in the same manner as if the offence of abetment is punished.

An offence under this section consists in the conspiracy without any reference to the subject-matter of the conspiracy and it is not necessary to establish the offence that there must have been definite property about which the parties are negotiating or which they have conspired to possess. **A I R 1927 Cal. 265.**

The punishment for a criminal conspiracy is more severe if the agreement is one to commit a serious offence; it is less severe if the agreement is to commit an act which, although illegal, is not an offence punishable with death, imprisonment of life or rigorous imprisonment for more than two years.

In the case of *Ghulam Jilani v. S.H.O.*, **P L J 1974 Cr. C (Lah.) 332**, Muhammad Afzal Zullah, J. held :

"Trial of offences relating to integrity of State and sovereignty of the country should be dealt with in a detached manner uninfluenced by momentary considerations or political motivations. State functionaries nevertheless should be equipped with power to withdraw cases even on considerations which are normally not made known to the public. Observance of law instead of adopting any other strategy or means serves the administration of criminal justice better."

According to the case of *Munir Ahmad Khan v. Inspector-General*, Jurisdiction of High Court at the Principal Seat could not be invoked in respect of the Press Conferences addressed by the accused at Islamabad. Contents of the Constitutional petition did not, *prima facie*, establish that the provisions of Sections 120-B, 121-A and 123-A, P.P.C. were attracted to the allegations made against the accused therein. Constitutional petition was dismissed in circumstances. **1994 P Cr. L J 1264.**

If an offence has been committed, the punishment is that provided by Section 109 of the Code, though, strictly speaking, there should not be a conviction in such cases of conspiracy but of abetment. If it has not been committed, the punishment is governed by Section 116 of the Code.

On conspiracy cannot deceive or cheat a co-conspirator in the matter of the same conspiracy. Where, therefore, the prosecution relied upon a letter, written by alleged conspirator A, as containing gross misrepresentation of fact, addressed to another alleged conspirator B, it was *held that*, B, cannot in circumstances of case be held to be in conspiracy with A. **P L D 1966 Kar. 183.**

The revision against the acquittal in a charge of conspiracy by the trial Court was dismissed. The arrest of some of respondents (acquitted accused) during days of occurrence did smack of something mischievous but without cogent evidence of their having present in jail during occurrence could not be deemed enough evidence for conviction and a sentence under Section 120-B. **N L R 1982 Cr. L J 136.**

According to the case of *Ghulam Muhammad v. State*, prosecution story was not only full of contradictions but was comprised of self-destructive admitted version. Conduct of Investigating Officer was not above board and *mala fides* of investigation were very clear which showed that there was a strong motive on part of prosecution witness and his relatives to involve accused in case and they had tried to fabricate evidence against the accused. Co-accused were acquitted by Trial Court and witnesses of prosecution were disbelieved to their extent whereas no reason was available to believe half truth of prosecution witnesses against accused. Prosecution having miserably failed to prove case against accused beyond reasonable doubt, conviction recorded by Trial Court was *set aside* and accused was ordered to be released extending him benefit of doubt. **1996 M L D 895.**

CHAPTER VI

OF OFFENCES AGAINST THE STATE

This Chapter consists of sections defining and punishing of offences against the State. The expression 'State' includes both Central and Provincial Governments. The offences against the State are in the nature of waging war against the Government.

The offences against the State fall into the following groups :--

- (1) Waging or attempting to wage war or abetting waging of war against Pakistan. (S. 121).
- (2) Collecting arms, etc., with intention of waging war against Pakistan. (S. 122).
- (3) Condemnation of the creation of the State and advocacy of abolition of its sovereignty (S. 123-A).
- (4) Assaulting President or Governor, etc., with intent to compel or restrain the exercise of any lawful power. (S. 124).
- (5) Sedition. (S. 124-A).
- (6) Waging war against any Asiatic Power in alliance with Pakistan. (S. 125).
- (7) Committing depredation on territories of a power at peace with Pakistan. (S. 126).
- (8) Public servant voluntarily allowing prisoners of State or war to escape. (S. 128).
- (9) Aiding escape, rescuing or harbouring prisoners of State or war. (S. 130).

121. Waging or attempting to wage war or abetting waging of war against Pakistan : Whoever wages war against Pakistan, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

Illustration

A joins an insurrection against Pakistan. A has committed the offence defined in this section

COMMENTS

Neither the number of persons nor the manner in which they are assembled or armed is material to constitute an offence under this section. The true criterion is the purpose or intention with which the gathering assembled. The object of the gathering must be to attain by force and violence an object of a general public nature thereby striking directly against the Government's authority. **I L R 1948 Nag. 126.**

The section embraces every description of war, whether by insurrection or invasion. It punishes equally the waging of war against the Government or attempting to wage such war, or abetting the waging of such war. The offence of engagement in a conspiracy to wage war, and that of abetting the waging of war against the Government under this section, are offences under the Penal Code only, and are not reason or misprison of treason **7 Beng. L R 63.**

Prosecution in order to prove the case against the accused had simply relied upon his statement allegedly made before police which under the law could not be used against him. There being no chance of conviction of accused in circumstances, pendency of case against him amounted to abuse of the process of Court and the same was quashed accordingly. **1995 M L D 544.**

Waging war : The expression 'waging war' must be construed in its ordinary sense, and a conspiracy to wage war, or the collection of men, arms and ammunition for these persons is not waging war. **1 L R 37 Cal. 467**. The waging of war is the attempt to accomplish by violence any purpose of a public nature. **24 Bom. L R 885**. To bring the act within the purview of waging war--

- (i) there must be an insurrection,
- (ii) there must be force accompanying that insurrection, and
- (iii) it must be for an object of a general nature.

Where the rioting or tumult is merely to accomplish some private purpose, of interest only to those engaged in it, not resisting or calling in question the Government's authority or prerogative, than the tumult, however, numerous or outrageous the mob may be is only a riot. But wherever the raising or insurrection has for its object a general purpose, not confined to the peculiar interests of the persons concerned in it, but common to the whole community and striking directly against the Government's authority then it assumes the character of treason. The numbers concerned and the manner in which they were equipped or armed are not material.

'Abets the waging of war' : It is not essential that as a result of the abetment the war should be waged in fact. The main purpose of the instigation should be 'the waging of war'. It should not be merely remote and incidental purpose but the thing principally aimed at by the instigator. **24 Bom. L R 885**. There must be active suggestion or stipulation to the use of violence.

Where the accused was an influential person in a village which was a hotbed of rebellion and he was the president of a body whose activities in regard to the capitation-tax were preliminaries to the rebellion and he took a leading part in resistance put up by the villagers and he held a meeting to resist payment of tax as a result of which many persons disappeared and joined the rebellion, and the accused led and helped the rebels, it was *held that* the accused abetted the waging of war against the King and was rightly convicted under this section. **A I R 1937 Rang. 118**.

[121-A. Conspiracy to commit offences punishable by Section 121 : Whoever within or without Pakistan conspires to commit any of the offences punishable by Section 121, or to deprive Pakistan of the sovereignty of her territories or of any part thereof, or conspires to overawe, by means of criminal force or the show of criminal force, the Federal Government or any Provincial Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation : To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof].

1. Section 121-A ins. by the Penal Code (Amendment) Act, XXVII of 1870.

COMMENTS

Scope : This section provides for the offence of conspiring to wage war against the Government. It was thought right to make the offence of conspiring by criminal force, or by show of criminal force more severely penal than the offence of actually taking part in an unlawful assembly, having for its object the overawing of the Government. The reason was this, that person who, by conspiring to bring about such a result, set the whole matter in motion, seemed more criminal and far more deserving of punishment than those who were their mere tools, and only took part in such an assembly. **I L R 33 Mad. 247.**

Under this section conspiracy itself is a crime and it is not necessary to establish any illegal act or illegal omission as overt acts of the conspiracy the existence of which has to be established. The illegal acts or omission, if established, support the case of the existence of the conspiracy itself, the offence being complete even though two persons conspiring together go no further than the original agreement. There cannot be strictly speaking direct evidence of the inspection of a conspiracy, if any, of the conspirators themselves do not choose to speak to the same.

Offence under this section cannot be tried by Court Martial when offence is committed by a person not subject to the Pakistan Army Act, 1952. **P L D 1975 S C 506.**

A conspiracy is a combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means. Any conspiracy to change the form of the Government, even though it may amount to an offence under another section of the Code, would not be an offence under this section, unless it is a conspiracy to overawe such Government by means of 'criminal force' or show of criminal force. **I L R 55 All 1040.**

Quashing of proceedings : Accused applicant died. Accused who was involved in a criminal case and had sought quashing of its proceedings had died during the pendency of his application. Proceedings before the Criminal Court having stood abated automatically on the death of the accused, no order of quashment could be passed with regard to the same which no more existed. Petition was consequently dismissed. **1996 P Cr. L J 433.**

Registration of case : Jurisdiction of High Court at the Principal Seat could not be invoked in respect of the Press Conferences addressed by the accused at Islamabad. Contents of the Constitutional petition did not, *prima facie*, establish that the provisions of Sections 120-B, 121-A and 123-A, P.P.C. were attracted to the allegations made against the accused therein. Constitutional petition was dismissed in circumstances. **1994 P Cr. L J 1264.**

Overawe : Overawe means something more than mere apprehension. It is a situation where one feels to choose between yielding to force or exposing to serious danger.

Explanation : The Explanation lays down that to constitute a conspiracy under this section, it is not necessary that any act or illegal omission should take place in pursuance thereof.

122. Collecting arms, etc., with intention of waging war against Pakistan : Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against Pakistan, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

COMMENTS

Scope : This section is intended to put down with a heavy hand any preparation to wage war against Pakistan. The act made punishable by it cannot be considered attempts: they are in truth preparation made for committing the offence of waging war.

123. Concealing with intent to facilitate design to wage war : Whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against Pakistan, intending by such concealment to facilitate or knowing it to be likely that such concealment will facilitate the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

¹[123-A. Condemnation of the creation of the State, and advocacy of abolition of its sovereignty : (1) Whoever, within or without Pakistan, with intent to influence, or knowing it to be likely that he will influence, any person or the whole or any section of the public, in a manner likely to be prejudicial to the safety ¹[or ideology] of Pakistan or to endanger the sovereignty of Pakistan in respect of all or any of the territories lying within its borders, shall by words, spoken or written, or by signs or visible representation ²[abuse Pakistan] or, condemn the creation of Pakistan by virtue of the partition of India which was effected on the fifteenth day of August, 1947, or advocate the curtailment or abolition of the sovereignty of Pakistan in respect of all or any of the territories lying within its borders, whether by amalgamation with the territories of neighbouring States or otherwise, shall be punished with rigorous imprisonment which may extend to ten years and shall also be liable to fine.

(2) Notwithstanding anything contained in any other law for the time being in force, when any person is proceeded against under this section, it shall be lawful for any Court before which he may be produced in the course of the investigation or trial, to make such order as it may think fit in respect of his movements, of his association or communication with other persons, and of his activities in regard to dissemination of news, propagation of opinions, until such time as the case is finally decided.

(3) Any Court which is a Court of appeal or of revision in relation to the Court mentioned in sub-section (2) may also make an order under that sub-section.

COMMENTS

Object : Object of this section is to prevent internal enemies of Pakistan from propagation the ideas condemning the creation of Pakistan or advocating the abolition of the sovereignty of Pakistan. It is similar to the offence of sedition punishable under Section 124-A.

The restrictions imposed by this section are in the interests of the security of the State and are more than reasonable within the meaning of Art. 8 of the Constitution (1956). Every inch of the territory of the State is more valuable than the liberty of speech which cannot be used for liquidating the State. **P L D 1957 Lah. 142.**

The provisions of this section, however, are no bar for propagation or for advocating for the personal liberties or for better Government. Such activities are granted rights under the Constitution for bettering the conditions of society. In such cases the Court has to strictly interpret what the accused says, preaches or demands. It is not correct to hold him guilty if he fights for better conditions or for better Government. **N L R 1981 S C J 321.**

1. Sec. 123-A ins. by the Pakistan Penal Code (Amendment) Act, VI of 1950.

1. Words inst. by the Pakistan Penal Code (Amendment) Act, II of 1992.

For alleged anti-national activities the accused was convicted by trial Court on the charge that he propagated through a pamphlet the secession of Karachi from Pakistan. On appeal, having a thorough critical examination of the prosecution evidence and following the principles of interpretation it was *held that* intention of the author of such document as involved is to be ascertained through the words used. words are to be taken to have been used in the sense which the common usage of mankind has applied to them in reference to the context in which they are found. **1981 S C M R 341.**

²**[123-B. Defiling or unauthorisedly removing the National Flag of Pakistan from Government building, etc. :** Whoever deliberately defile ³[or puts on fire] the National Flag of Pakistan, or unauthorisedly removes it from any building, premises, vehicle or other property of Government, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.]

124. Assaulting President, Governor, etc., with intention to compel or restrain the exercise of any lawful power : Whoever, with the intention of including or compelling the President of Pakistan, or the Governor of any Province, to exercise or refrain from exercise in any manner of the lawful powers of the President, or Governor,

assaults, or wrongfully restrains, or attempts wrongfully to restrain or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, the President, or Governor,

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

¹**[124-A. Sedition :** Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Federal or Provincial Government established by law shall be punished with imprisonment for life to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1 : The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2 : Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3 : Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section].

² Section 123 B ins. by the Criminal Law (Second Amendment) Ordinance XLIII of 1984.

Words added & Pakistan Penal Code (Amendment) Act 11 of 1992.

Section 124 A ins. by the Penal Code (Amendment) Act. XXVII of 1870.

COMMENTS

Scope : This section is based on the principle that every State whatever its form of Government, has to be armed with the power to furnish those who by their conduct, jeopardise the safety and stability of the State, or disseminate such feelings of disloyalty as have the tendency to lead to the disruption of the State or to public disorder. At the same time such legislation has to protect and guarantee the freedom of speech and expression which is the *sine qua non* of every form of domestic Government. Explanations 2 and 3 appended to the section are based upon this principle.

This section defines sedition and prescribes its punishment. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or disaffection, to create public disturbance or to lead to civil war, to bring into hatred or contempt the sovereign or Government, the law or the Constitution of the State and generally all endeavours to promote public disorder.

Object : Object of Section 124-A, P.P.C. is to prohibit the feelings which may be excited against the Government in a variety of ways. One of such ways is possibly to excite feelings by unfair condemnation of any of its services. **1996 P Cr. L J 414.**

Ingredients : The ingredients of this section are :

1. Bringing or attempting to bring into hatred or contempt, or exciting or attempting to excite disaffection towards the Government.
2. Such act or attempt may be done (i) by words, either spoken or written, or (ii) by signs, or (iii) by visible representation.

The provisions of this section are very wide and strictly speaking they would cover everything amounting to defamation of the Government if one excludes from the meaning of that term any criticism in good faith of any particular measures or acts of administration. **A I R 1941 All. 156.**

In *The State v. Abdul Ghaffar Khan*, **P L D 1957 Lah. 142**, Shabbir Ahmad, J. held :-

If the abolition of the sovereignty of Pakistan on any part of its territories is advocated, an offence under Section 123-A of the P.P.C. will be committed whatever the circumstances in which and the time at which such abolition is advocated. The restrictions imposed by Section 123-A are in the interests of the security of the State and are more than reasonable within meaning of Article 8 of the Constitution. Every inch of the territory of the State being more valuable than the liberty of speech and expression enjoyed by its citizens, such liberty cannot on any social, moral, legal or political ground be used as the "democratic" means of liquidating the democratic State that has bestowed that liberty. When Article 216 talks about the amendment of Article 1, what is meant is not the abolition of the sovereignty of Pakistan on any part of the territories mentioned in Article 1 but only the re-adjustment of the Provinces or breaking up of any of the Provinces into parts. *Re: Section 124-A, P.P.C.*--that if hatred, contempt or disaffection is created against the present political system or attempts are made for that purpose, the result cannot but be to affect prejudicially the security of Pakistan and it follows that Section 124-A of the P.P.C. is not hit by Article 8. Even if the definition of the word "Government" contained in Section 17 of the P.P.C. is to be applied for interpreting the expression "Government established by law in the Provinces and the Capital of the Federation", the position of Section 124 will not alter because if hatred, contempt or disaffection is created against the persons who exercise executive Government or attempts to that effect are made the probable result would be a breach of public order and on that ground Section 124-A of the P.P.C. will not become void by reason of Article 8 read with Article 4 of the Constitution. *Re: Section 153-A, P.P.C.*--that the section makes punishable the promotion of hatred and enmity and there can be no manner of doubt that if acts mentioned in Section 153-A were not offences public order will be prejudicially affected. The Explanation attached to the section does not bar the pointing out of objectionable matters which are promoting feelings of hatred or enmity and the

restriction on the liberty of speech and expression imposed by Section 153-A is, therefore, reasonable. Therefore, none of the Sections 123-A, 124-A and 153-A, P.P.C. has been scored off the P.P.C. by reason of Article 8 of the Constitution.

Intensity of bad feeling not relevant : The offence of sedition under Section 124-A, Penal Code consists in exciting or attempting to excite in others bad feelings against the Government. The intensity of the bad feelings is irrelevant though it may have a bearing on the question of sentence. It is not necessary that the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that is their intention or tendency. **P L D 1960 Lah. 35.**

Rule to determine seditious nature of Speech : When considering a speech to determine if it offends against Section 124-A or allied sections the speech has to be read as a whole so that the intention of the speaker may become clear and only portions of the speech may not be used against him and he should not be held to be innocent simply because some parts of the speech are not open to objection. In addition all the surrounding circumstances such as the time and place when and where the speech was made, and the audience to which it was addressed have to be taken in view. If the speeches have created or have attempted to create the hatred, contempt and disaffection contemplated by Section 124-A the fact that what the accused said to attain his object was true would not be material on the question of his guilt, his act will still remain an offence though the truth may affect the question of sentence. Actual repercussion of speech in form of hatred, etc., are not necessary. **P L D 1957 Lah. 142.**

Mere criticism of Government not seditious : Section 124-A, P.P.C., whatever its significance and the scope of its application was before the Constitution, will have to be read in the light of the changed circumstances, and subject to Article 8 of the Constitution of the Islamic Republic of Pakistan, which lays down that every citizen shall have the right to freedom of speech or expression subject to any reasonable restrictions imposed by law in the interest and security of Pakistan, friendly relations with foreign States, public order, decency, or morality, or in relation to contempt of Court, defamation or incitement to an offence. It is permissible for a citizen to hold up the men who are charged or have been charged with the executive Government of the country and the care of her destinies to ridicule and contempt if they are guilty of maladministration. Where, therefore, all that the accused had done was to give an exaggerated emphasis on the treatment meted out to a leader of a political party while under custody undergoing trial for offences under Section 123-A and 124-A, P.P.C. It was *held* that the accused was not guilty under Section 124-A, P.P.C. It is not criticism of the Government, in whatever venomous and enraging of words it is cloaked which constitutes an offence under Section 124-A but the adoption of methods for the attainment of a purpose which encourage force and violence and which may lead to conflict with the authorities with the certainty that there will be grievous loss of life. Short of that, every criticism of Government is permissible. Hatred, contempt or disaffection towards Government is usually created by words imputing to the Government base, dishonourable, corrupt or malicious motive in the discharge of its duties. Ministers may form the Government but they are certainly not the Government within the meaning of the word used in Section 124-A, P.P.C. Freedom of speech is only curtailed when it affects the security of Pakistan, friendly relations with foreign States, public order, decency and morality, etc. The demand that certain tract of Pakistan should be named as Pakhtunistan or Pathanistan, even if it is within Pakistan, is calculated ultimately to harm Pakistan irreparably. **P L D 1958 Pesh. 15.**

Mere criticism of actions and policies of Government even though harsh in language does not attract definition of sedition unless recognition of Government established by law refused or call made to rebel against such Government or to resort to unconstitutional methods by use of force so as to disturb public peace or to disrupt maintenance of essential supplies. **P L D 1977 Lah. 1279.**

The accused was alleged to have held out threats to overthrow Government besides other accusations. Bail was refused by High Court. The Supreme Court on appeal *held* that the

accused being ardent critic of the Government and the action of Government in initiating various cases in quick succession was not confidence inspiring. In the circumstances impression of mechanical prosecution was held to be unavoidable. The accused was bailed out. **P L D 1977 S C 273.**

Complaint : Section 124-A, P.P.C. creates an offence which is not cognizable. What is more that under Section 196, Cr.P.C. a Court cannot take cognizance of an offence under Section 124-A, P.P.C. unless upon a complaint made by order of, or under authority from the Federal Government or the Provincial Government or some other officer empowered in this behalf by either of the two Governments. It would thus appear that not only the investigation into an offence under Section 124-A, P.P.C. is barred but even the Court can take cognizance only after a competent authority files a complaint. The significant words in Section 196, Cr.P.C. are "upon complaint made by order of, or under authority from." These words may signify and indeed signify that the Federal Government or the Provincial Government or some officer empowered in this behalf by either of the two Governments could order the filing of the complaint or authorise the filing of the same. **1976 P Cr. L J 184.**

125. Waging war against any Asiatic Power in alliance with Pakistan : Whoever wages war against the Government of any Asiatic Power in alliance or at peace with Pakistan or attempts to wage such war, or abets the waging of such war, shall be punished with imprisonment for life to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

126. Committing depredation on territories of Power at peace with Pakistan : Whoever commits depredation, or makes preparations to commit depredation, on the territories of any power in alliance at a peace with Pakistan, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

127. Receiving property taken by war or depredation mentioned in Sections 125 and 126 : Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in Sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and forfeiture of the property so received.

COMMENTS

The property received by a person which was secured by committing the offence under Sections 125 and 126 have been made an offence in this section and it has been provided that anybody receiving the property which he knows that the same has been taken in the commission of any of the offences mentioned in Sections 125 and 126 shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine. Besides, the property so received shall also be forfeited. It may be added here that Sections 125 and 126 punish the offences of waging war or committing depredation against the powers which are at peace with Pakistan.

128. Public servant voluntarily allowing prisoner of State or war to escape : Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Any public servant having the custody of any State prisoner or prisoner of war has to suffer punishment if he voluntarily allows such prisoners to escape from any place in which they are confined. In case the state prisoner or prisoner of war escapes without consent of the public servant is not liable to punishment under this section, although he may incur liability under some other section.

State prisoner is one whose confinement is necessary in order to protect and preserve the solidarity, integrity and security of the country from foreign hostility or from internal commotion and who has been confined by the order of the Government. Prisoner of war is one who is taken in arm while fighting in a war. Those who are not in arms or who being in arms submit and surrender themselves, are not to be slaughtered but to be made prisoners. But it seems that those only are prisoners of war who are taken in arms.

129. Public servant negligently suffering such prisoner to escape : Whoever, being a public servant and having the custody of any State prisoner or prisoner of war negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

COMMENTS

Scope : Offences under this section is like the one provided in Section 128. Under it the escape of the prisoner should be owing to the *negligence* of the public servant. Section 128 punishes a public servant who voluntarily allows a State prisoner to escape Section 223 punishes the escape of an ordinary prisoner under similar circumstances.

130. Aiding escape of, rescuing or harbouring such prisoner : Whoever, knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner; or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation : A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in Pakistan, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

COMMENTS

Scope : This section uses words more extensive than those in the two preceding ones which contemplate an escape only from some prison or actual place of custody. Again in the last two sections the offender is a public servant; under this section he may be any person. The scope of this section is much narrower than Section 129. This section requires that the rescue or assistance should be given "knowingly".

It is essential to show that the accused had a knowledge of the character in which the prisoner is confined, i.e., that he is a prisoner of State or of war.

CHAPTER VII

OF OFFENCES RELATING TO THE ARMY, NAVY AND AIR FORCE

The heading of this Chapter indicates that the sections under this Chapter relate to offences of and punishments for mutiny, assault by soldiers, sailors and airmen on their superiors, desertion of soldiers, sailors and airmen and abetments thereof, etc.

131. Abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty : Whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, or attempts to seduce any such officer, soldier, sailor, or airman from his allegiance of his duty, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

¹[*Explanation :* In this section, the words "officer", "soldier", "sailor" or "airman" include any person subject to the Pakistan Army Act, 1952 (XXXIX of 1952), or the Pakistan Navy Ordinance, 1961 (XXXV of 1961), or the Pakistan Air Force Act, 1953 (VI of 1953), as the case may be.]

COMMENTS

The first part of this section relates to the offence of abetting mutiny. The offence contemplated is an abetment which is not followed by actual mutiny, or which, supposing actual mutiny follows is not the cause of that mutiny.

The offence of 'mutiny' consists in extreme insubordination as if a soldier resists by force, or if a number of soldiers rise against or oppose their military superiors, such acts proceeding from alleged or pretended grievances of a military nature. Acts of a riotous nature directed against the Government of civil authorities rather than against military superiors seem also to constitute mutiny.

132. Abetment of mutiny, if mutiny is committed in consequence thereof : Whoever abets the committing of mutiny by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, shall, if mutiny be committed in consequence of that abetment, be punished with death or with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Scope : Section 138 is intended to punish a person for abetment of mutiny and sedition by a military man. The offence contemplated is an abetment which is not followed by actual mutiny, or which, supposing actual mutiny follows, is not the cause of the mutiny. If the mutiny be actually committed in consequence of such abetment, then Section 132 will apply which provides an enhanced punishment.

The word "whoever" in the section refers to a person not subject to the Army Act.

133. Abetment of assault by soldier, sailor or airman on his superior officer, when in execution of his office : Whoever abets an assault by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, on any superior officer being in the execution of his office, shall be punished with

1. Explanation subs. by Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.

imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENTS

Scope : This section is intended to punish persons, who, not being military, abet an assault by an officer, soldier, sailor or airman on any of his superior officers.

This section punishes abetment of assault which is not committed. The next section punishes similar abetment where the offence is committed.

134. Abetment of such assault, if the assault is committed : Whoever abets an assault by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Scope : This section punishes the abetment of an assault when such assault is committed in consequence of that abetment. It is but an aggravated form of the offence made punishable by the last section. It stands in the same relation to Section 133, as Section 132 does to Section 131.

135. Abetment of desertion of soldier, sailor or airman : Whoever abets the desertion of any officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Offences referred to in this and the next section are also punishable under the Army Act. The section is somewhat ambiguous. It does not say whether the desertion abetted under it must take place or not.

Desertion : In ordinary language to desert is to part from, and connection with. In Military Law it means to leave without permission, for save in violation of duty, i.e., to quit service in that permission, run away.

136. Harboursing deserter : Whoever, except as hereinafter excepted, knowing or having reason to believe that an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, has deserted, harbours such officer, soldier, sailor or airman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Exception : This provision does not extend to the case in which the harbour is given by a wife to her husband.

COMMENTS

A person harbouring a deserter is an 'accessory after the fact'. The gist of the offence is concealment of a deserter to prevent his apprehension. Exception is made only in the case of a wife. The word 'harbour' is defined in Section 52-A.

137. Deserter concealed on board merchant vessel through negligence of master : The master or person incharge of a merchant vessel, on board of which deserter from the Army, Navy or Air Force of Pakistan

is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred rupees, if he might have known of such concealment but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

138. Abetment of act of insubordination by soldier, sailor or airman : Whoever abets what he knows to be an act of insubordination by an officer, soldier, sailor or airman, in the Army, Navy or Air Force of Pakistan, shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENTS

Scope : This section punishes abetment of an act of insubordination by a soldier, sailor, or airman. In this section it is expressed as part of the definition of the offence that the abettor knows the quality of the act abetted, that is, he knows it to be an act of insubordination.

138-A. Application of foregoing sections to the Indian Marine Service : [Rep. by the Amending Act, 1934 (XXXIX of 1934), Section 2 and Sched].

1[139. Persons subject to certain Acts : No person subject to the Pakistan Army Act, 1952 (XXXIX of 1952), the Pakistan Air Force Act, 1953 (VI of 1953), or the Pakistan Navy Ordinance, 1961 (XXXV of 1961), is subject to punishment under this Code for any of the offences defined in this Chapter.]

COMMENTS

Scope : This section clearly states that the persons subject to Military law will not be dealt with under the Code for offences defined in this Chapter. The reason for this is that persons subject to Military Law cannot be punished under it.

In a case where an Ex-Army Officer was accused of seducing Army Officers from their duty, it was held that such offence is barred by Section 139, P.P.C. and is triable only under Army Act. P L D 1975 Lah. 999.

140. Wearing garb or carrying token used by soldier, sailor or airman : Whoever, not being a soldier, sailor or airman, in the Military, Naval or Air Service of Pakistan, wears any garb or carries any token resembling any garb or token used by such a soldier, sailor or airman with the intention that it may be believed that he is such a soldier, sailor or airman, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENTS

The gist of the offence herein made penal is the intention of the accused wearing the dress of the soldier, etc., for the purpose of inducing others to believe that he is in service at the present time. Merely wearing a soldier's garb without the specific intention is no offence. Otherwise actors putting on every kind and shade of uniform will be hauled up under this section. Similarly, persons using cast-off uniforms of soldiers will not be liable.

Fraudulent intention is not made a part of the definition.

1. Section 139 subs. by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.

CHAPTER VIII

OF OFFENCES AGAINST THE PUBLIC TRANQUILLITY

This Chapter deals with the offences against public peace. The public peace and order may be disturbed even by one single individual, but if many persons assemble together to disturb public peace and order, the trouble becomes magnified and deserves special treatment. Thus this Chapter deals with offences committed by unlawful assemblies and the offences of rioting and affray, etc.

The offences may be classified in the following four groups :--

1. *Unlawful assembly :*

- (a) Being a member of an unlawful assembly. (Ss. 141, 142 & 143).
- (b) Joining an unlawful assembly armed with deadly weapons. (S. 144).
- (c) Joining or continuing in an unlawful assembly knowing it has been commanded to disperse. (S. 145).
- (d) Hiring of persons to join an unlawful assembly. (S. 150).
- (e) Harboursing persons hired for an unlawful assembly. (S. 157).
- (f) Being hired to take part in an unlawful assembly. (S. 158).

2. *Rioting (Ss. 146, 147):*

- (a) Rioting with deadly weapons. (S. 148).
- (b) Assaulting or obstructing a public servant in the suppression of a riot. (S. 152).
- (c) Wantonly giving provocation with intent to cause riot. (S. 153).
- (d) Liability of the owner or occupier of land on which an unlawful assembly is held or a riot is committed. (S. 154).
- (e) Liability of the person for whose benefit a riot is committed. (S. 155).
- (f) Liability of the agent or owner or occupier for whose benefit a riot is committed. (S. 156).

3. *Promoting enmity between different classes. (S. 153-A).*

4. *Affray. (Ss. 159 & 160).*

141. Unlawful assembly : An assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly is--

First : To overawe by criminal force, or show of criminal force, the Federal or any Provincial Government or Legislature, or any public servant in the exercise of the lawful power of such public servant; or

Second : To resist the execution of any law, or of any legal process; or

Third : To commit any mischief or criminal trespass, or other offence; or

Fourth : By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth : By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation : An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

COMMENTS

Essentials : The essentials of an unlawful assembly are :

- (1) An assembly of not less than 5 persons.
- (2) They must have a common object.
- (3) The common object must be one of the five objects specified in the section.
- (4) The common object must be unlawful.

To constitute "unlawful assembly", the assembly must consist of five or more persons having one of the five specified objects as their common object. If the number of persons is less than five, it would not constitute 'unlawful assembly' even if the members have one of the five specified objects as their common object. The crucial question to determine is whether the assembly consisted of five or more persons and whether they entertained one or more of the common objects, as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses.

Mere presence of a person at the place where members of unlawful assembly have gathered for carrying out their illegal common object does not incriminate him. But the question is one of fact whether the presence was innocent or as a member of the unlawful assembly.

The requirement of Section 141 is that in order to succeed the prosecution must prove not only that an accused was a member of unlawful assembly but also that being such a member he used criminal force or by show of criminal force had obtained possession of any property or deprived any person of the enjoyment of a right of way or the use of water. **1971 P Cr. L J 528.**

A person in lawful possession of property using force for maintaining that possession is not "enforcing a right" but "preventing a wrong". Such persons were held to be not members of an unlawful assembly. **P L D 1964 Dacca 480.** The accused cannot be punished under this section where it is not found that the accused had an unlawful common object or they were armed with deadly weapons at the time of occurrence. **P L D 1971 Dacca 254.** This section calls for no penal action where common object is not proved. **P L D 1971 Dacca 254.** When a lawful assembly is alleged to have become unlawful subsequently; it requires to be established the development of such change to prove the circumstance applicable to all the persons which got together and influenced them all in one direction, namely that of using criminal force or committing mischief, criminal trespass or other offences or of resisting the execution of law or legal process. **P L D 1965 Kar. 637.** A lawful assembly may become unlawful subsequently. **P L D 1975 S C 351.**

142. Being member of unlawful assembly : Whoever being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of any unlawful assembly.

COMMENTS

Member of unlawful assembly : This section explains as to who can be a member of an unlawful assembly. Whoever intentionally joins unlawful assembly or continues in it, being aware of the facts which render an assembly an unlawful assembly is said to be a member of

unlawful assembly. Thus mere presence on an assembly does not make such a person a member of an unlawful assembly unless it is shown that he has done something which would make him a member of an unlawful assembly or unless the case falls under Section 142, Penal Code.

Where the workman entered Manager's office and resorted to insulting, beating, wrongfully restraining and also forcing the manager to write an order in accordance with their wishes. The police challaned the accused workmen under Section 142, P.P.C. but Government later on withdrew the case. The management meanwhile approached National Industrial Relations Commission in respect of the same incident complaining that under the relevant provisions of law, it was an offence and the workmen be prosecuted for violating the relevant law. It was *held that* the ingredients of offences under Pakistan Penal Code for which the accused workmen were prosecuted materially differed from the ingredients constituting offence for which they were convicted by the Industrial Relations Commission. Mere fact that two prosecutions were the result of same incident makes no difference. The conviction of workmen by the Industrial Relations Commission was held not violative of Article 13(a) of the Constitution of the Islamic Republic of Pakistan. **P L D 1956 S C (Ind.) 249.**

143. Punishment : Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENTS

Punishment : The underlying principle of Section 141 is that law discourages tumultuous assemblage of men to preserve the public peace. It defines what an 'unlawful assembly' is. Section 142 gives the connotations of a member of an unlawful assembly. Section 143 punishes tumultuous assemblies as they endanger public peace. It does not require that the purposes of the unlawful assembly have been fulfilled.

If members of a family and other residents of the village assembly, all such persons could not be condemned *ipso facto* as being members of that unlawful assembly. It is necessary, therefore, for the prosecution to lead evidence pointing to the conclusion that all the persons had done or had been committing some overt act in prosecution of the common object of the unlawful assembly. The omnibus kind of evidence that all the appellants and many more were the miscreants and were armed with deadly weapons like guns, spears, *pharsas*, axes, *lathis*, etc., has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. The case of each individual accused has to be examined to satisfy that mere spectators who had not joined the assembly and were unaware of its motive had not been branded as members of the unlawful assembly which committed the crime. **P L D 1977 Kar. 145.**

The essence of the offence is the common object of the persons forming the assembly. Whether the object is in their minds when they come together or whether it occurs to them afterwards, is not material. But it is necessary that the object should be common to the persons who compose the assembly that is, they should all be aware of it and concur in it. It seems also that there must be some present and immediate purpose of carrying into effect the common object; and that a meeting for deliberation only, and to arrange plans for future action, is not an 'unlawful assembly'. **34 P R 1868.**

First Clause : A crowd of persons, assembling to see what the police-officers were doing in arresting a person who had escaped from lawful arrests, who do not use force or show of force, does not form an unlawful assembly. But where the common object found is to overawe the police in the performance of their duty, the persons who were committing any act of violence, were held to be members of an unlawful assembly. **6 C W N 507.**

Second Clause : When there is no intention of carrying them into effect, are not sufficient to prove an intention to resist. When an order is lawfully made under the provisions of a statute, that order is law, and resistance to the execution of that law is an offence.

"Resistance" implies something more than disobedience and a mere intention to disobey will not suffice. It connotes some overt act and that mere words, when there is no intention of carrying them into effect, are not sufficient to prove an intention to resist. The conduct of the assembly and the refusal of the members of it to disperse after being ordered to do so constitutes an overt act, and establishes a common object to resist the order within the meaning of this clause. **A I R 1923 Pat. 1.**

Third Clause : This clause specifies only two offences, viz., mischief and criminal trespass but the words "or other offences" seem to denote that all offences are included though only two are mentioned in a haphazard way.

Any assembly of five or more persons becomes an unlawful assembly if the common object is not to arrest persons who commit an offence but to subject to humiliation persons who intervene on behalf of the offenders.

Fourth Clause : The act falling within the purview of this clause is made punishable owing to the injurious consequences which it is likely to cause to the public peace. But this clause does not take away the right of private defence of property. It does not affect clause (2) of Section 105 which allows a person to recover the property carried away by theft. It is meant to prevent the resort to force in vindication of supposed rights. It makes a distinction between an admitted claim or an ascertained right and a disputed claim. **Cr. L J 427.**

If persons are rightfully in possession of land, and find it necessary to protect themselves from aggression, they are justified in taking precautions and using such force as is necessary, to prevent the aggression. Where five or more persons assemble for maintaining by force or show of force a right which they *bona fide* believe they possess, and not for enforcing by such force or show of force a right or supposed right of theirs, they do not constitute an unlawful assembly. But when a body of men are determined to vindicate their rights, or supposed right, by unlawful force, and when they engage in a fight with men who on the other hand, are equally determined to vindicate, by unlawful force, their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself, but each side is trying to get the better of the other.

Where a licence had been taken out for a procession, but the processionists violated the conditions of the licence which prescribed the route and the limit up to which the procession was permitted to proceed, and on being directed by the Police and the Magistrate not to do so, a group of the processionists made a determined effort to break through a Police cordon, it was *held that* the latter constituted an unlawful assembly.

Fifth Clause : The explanation says that an assembly which is lawful in the beginning may suddenly turn unlawful any previous concert among its members.

A lawful assembly does not become unlawful merely because the members know that their assembly would be opposed and a breach of the peace would be committed.

The mere fact that a person applied to be a member of an association some months before it was declared unlawful cannot by any stretch of imagination be said to be a proof of his membership of the association after it had been declared unlawful, some overt act as a member subsequent to such declaration must be proved. **A I R 1931 Lah. 261.**

Where there was a dispute of long-standing between the accused and certain other parties regarding the possession of certain land, and the accused went to sow the land with indigo, accompanied by a body of men armed with clubs and who kept off the opposite-party by brandishing their weapons while the land was being sowed, it was *held that* they were guilty of this offence. Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with clubs prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and died

subsequently, it was *held* that the common object was not to enforce a right but, to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful. **1 L R 36 Cal. 865.**

Free fight : A free fight is one when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends upon the tactics adopted by the rival commanders. In order to establish a common intention of an unlawful assembly it is not necessary to prove that its members actually met and conspired to commit an offence, but such an intention can be inferred from the circumstances of the case. In the case of a concerted attack by five or more persons it is a perfectly valid and reasonable inference that they all had a common intention and were, therefore, members of an unlawful assembly. **A I R 1927 Lah. 193.**

144. Joining unlawful assembly armed with deadly weapon : Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section, provides for an enhanced punishment where member of an unlawful assembly is armed with a deadly weapon.

The charge under Section 144 of the Penal Code should state the common object of the assembly. The omission to state the common object in the charge does not, however, vitiate a conviction if there is evidence on record to show what the common object was. **1968 P Cr. L J 972.**

A weapon which when used for its designed purpose is likely to cause death is a deadly weapon. Deadly weapons are lethal weapons, such as swords, daggers, pistols, guns, spears. Kirpans are also deadly weapons. **A I R 1958 Raj. 226.** It was doubted whether *lathi* is a deadly weapon. **1968 P Cr. L J 371.** In another case it was positively *held* that *lathi* is not usually regarded as a deadly weapon. **1968 P Cr. L J 891.**

The 'weapon of offence' means a weapon which, under the present circumstances and at the present time (during the existence of the unlawful assembly) is an offensive weapon, notwithstanding that it might be otherwise at a different time and place.

145. Joining or continuing in unlawful assembly, knowing it has been commanded to disperse : Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section is intended to punish a person who joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse.

The essential ingredient of offences under Sections 151 and 145, Penal Code is that the accused is lawfully commanded to disperse after he joins or continues in an assembly of 5 or more persons or in an unlawful assembly, as the case may be. If a person was not lawfully

commanded to disperse he does not come within the mischief of Section 151 or Section 145. In the accusations in these cases it was not stated that Police Officer commanded the petitioners to disperse. Offering resistance is distinct from commanding to disperse. Thus the accusations, as they are, do not constitute an offence under Section 151 of the Penal Code. For the same reason they do not also constitute an offence under Section 145. **1969 P Cr. L J 373.**

146. Rioting : Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

147. Punishment for rioting : Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

The essential question in a case under Section 147 is whether there was an unlawful assembly as defined in Section 141. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused and even when it is possible to convict less than five persons only, Section 147 still applies, if upon the evidence in the case the Court is able to hold that the person or persons who have been found guilty were members of an unlawful assembly of five or more persons, known or unknown, identified or unidentified.

Ingredients : The ingredients of an offence of rioting are :--

- (1) Use of force or violence by an unlawful assembly or by any member thereof. **P L D 1959 Kar. 470.**
- (2) Such force or violence should have been used in prosecution of the common object of such assembly.

It is not necessary that the force or violence should be directed against any particular person or object. The use of any force, even though it be of the slightest possible character, by any one of an assembly once established as unlawful, constitutes rioting. Actual use of force and not merely a show of force, is necessary. Where a number of men who are assembled at a certain place run away on, being attacked by the opposite-party, they are not guilty of rioting.

Acts done by some members of an unlawful assembly outside the common object of the assembly or of such a nature as the members of the assembly could have known to be likely to be committed in prosecution of that object, are only chargeable against the actual perpetrators of those acts. Common object may be formed on the spur of the moment. **P L D 1959 S C (Pak.) 251.**

The petitioners were convicted and sentenced to 6 months' R.I. on two counts under Sections 147, P.P.C. and 323/149, P.P.C. The revision petition came up with inordinate delay of over 10 years. The sentence was reduced to imprisonment already undergone by petitioners, in circumstances. **1982 P Cr. L J 500.**

Where a member of an unlawful assembly in prosecution of the common object of the assembly throws down a man and then causes him bodily hurt, the offence of rioting under this section is complete as soon as the man is thrown down by using force. The hurt subsequently caused would come under Section 323 or Section 325.

The accused convicted under Section 148. The recording of conviction under Section 147 was held unnecessary. **P L D 1959 Lah. 406.**

Where the common object of the entire assembly was theft, or if assault was separate object of four of the members of the assembly only and was committed by the prosecution of that object, it would not under the unlawful assembly riotous. **P L D 1952 Dacca 192.**

Sudden quarrel : If a number of persons assembled for any lawful purpose suddenly quarrel without any previous intention or design they do not commit 'riot' in the legal sense of the word. It is, however, not necessary that there should be a common object prior to the commencement of the fight. It is also immaterial that the accused conceived the idea of injuring suddenly after they went to the scene of offence.

Private defence : Where a party acts in the exercise of the right of private defence, there is no riot, and if the accused are able to establish that they acted in the right of private defence, the burden of proving that they exceeded it lies upon the prosecution. An assembly which has the common object of inflicting hurt upon any other person or body of persons is *prima facie* unlawful.

Large scale or mammoth rioting : There are five fundamental principles which a Court has to observe in cases of 'mammoth rioting' :

- (1) Notwithstanding the large number of rioters or of the persons put up in Court for rioting, and the consequent difficulty for the prosecution to name the specific acts attributed to each of the accused, the Court must see to it that all the ingredients required for unlawful assembly and rioting are strictly proved by the prosecution before convicting particular accused person.
- (2) Spectators, wayfarers, etc., attracted to the scene of the rioting by curiosity, should not be, by reason of their mere presence at the scene of rioting and with the rioters held to be members of the unlawful assembly of rioters. But of course, if they are proved to have marched with the rioters for a long distance, when the rioters were shouting tell-tale slogans and pelting stones, it will be for them to prove their innocence under Article 122 of the Qanun-e-Shahadat Order, 1984.
- (3) It will be very unsafe, in the case of such a large mob of rioters, to rely on the evidence of a single witness speaking to the presence of an accused in that mob for convicting him, especially, when no overt act of violence, or shouting of slogan, or organising the mob, or giving orders to it or marching in procession with it, or other similar thing is proved against him. In a big riot by hundreds of persons, it is very easy even to mistake one person for another, and to implicate honestly really innocent persons, and even to mistake persons seen elsewhere as having been seen there. An ordinary rule of caution and prudence will require that an accused person identified only by one witness and not proved to have done any overt act, etc., as described above, should be acquitted, by giving him the benefit of the doubt.
- (4) Where there are acute factions based on either agrarian disputes and troubles or on political wrangling and rivalry or on caste division or on the division of the "haves" and the "have-nots", the greatest care must be exercised before believing the evidence of a particular witness belonging to one of these factions against an accused of the opposite view. This principle becomes of special importance when there are no overt acts, etc., proved, and when there only one or two witnesses speaking to the presence of the accused among the rioters, and they belong to the classes or factions opposed to the accused.

- (5) Mere followers in rioting deserve a much more lenient sentence than leaders, who mislead them into such violent acts, by emotional appeals, slogans and cries.

148. Rioting, armed with deadly weapon : Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

Enhanced punishment is provided if a person is armed with a deadly weapon.

If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under this section. It is only the actual person so armed who can be charged under it. A person cannot be found guilty under this section unless he actually has a dangerous weapon in his hands. **P L D 1981 S C 286**. Only person actually armed with deadly weapon can be convicted under Section 148, P.P.C. **1981 P Cr. L J 1277 (2)**. Where blunt weapons were used for inflicting injuries on deceased and others, benefit of doubt was given to accused in respect of offence under Section 148, P.P.C. **P L D 1959 Dacca 139**.

In a case of free fight, often both sides try to conceal true facts and exaggerate part played by their adversary. In such case, each accused would be liable for part played by him. **P L D 1957 Lah. 1023**.

The presence of the prosecution witness at scene was corroborated by F.I.R. as well as other eye-witnesses and his testimony was consistent with the other prosecution witnesses. The contention that such witness was marked present at place of his duty in other city was nothing unusual for such person to have witnessed crime and attended his work on the same day place of work was only 14 miles away from that of occurrence. The statement of such witness could be disbelieved, in circumstances. **1983 S C M R 1211**.

The question whether or not a *lathi* is a deadly weapon is a question of fact to be determined on the special circumstances of each case. A *lathi* is not usually regarded as deadly weapon. **1968 P Cr. L J 891** unless and until it is used on the head or on some vital part of a person. If, however, persons who are not carrying deadly weapon themselves are rioting and are found guilty, they can only be found guilty under Section 148 read with Section 149 because Section 149 constitutes a separate offence of its own.

Reduction of Sentence : Appeal against conviction with sentence of one year's R.I. conviction not challenged by appellants. High Court in circumstances reducing sentence to period already undergone. **N L R 1994 Cr. L J 558**.

'Deadly weapon' : "Stick" is not deadly weapon. **1968 P Cr. L J 371**.

Rioting, armed with deadly weapon : Accused person cannot be convicted under Section 148, P.P.C. unless he is found to be a member of an unlawful assembly using force or violence in prosecution of the common object of such assembly. **P L D 1996 S C 219**.

The retrial for acquittal was opposed on account of delay. The contention that as some witnesses had already resiled and the medical witnesses did not support the prosecution version narrated in F.I.R. retrial would be an exercise in futility. Assertion could not be gone into at revision stage as proper trial was not held. The trial Court must assess evidence to be

produced before it in accordance with law. The prosecution witnesses named in the F.I.R. were available and their evidence and evidence of other prosecution witnesses was given up by the Assistant Public Prosecutor on wrong assumption yet to be recorded and considered. The order of acquittal was set aside and retrial was ordered in circumstances. **1983 P Cr. L J 967.**

Leave to appeal : Leave to appeal was granted to consider contention that in a criminal case a counsel appearing for an accused could not make concession accepting the guilt of the accused or withdrawing the appeal against the conviction on the basis of his power of attorney and notwithstanding such concession, the Court could proceed to decide the case on merits especially when the Court found that the compromise placed before it related to a non-compoundable offence. **1995 S C M R 858.**

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object : If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

COMMENTS

Scope : This section deals with what is called vicarious liability. Section 149 of the Pakistan Penal Code has two parts one dealing with liability for offences which are committed in prosecution of the common object of the unlawful assembly and the second dealing with liability for those offences which the members of the assembly knew to be likely to be committed in prosecution of that object. The distinction between two parts of the section appears from the following passage: "Once an assembly has become unlawful then all things done in the prosecution of the common unlawful object of that assembly are chargeable against every member thereof. The liability of every member extends not only to the acts intended by all to be done, but also to those offences which are likely to be committed in achieving the common object. To attract the constructive liability incurred under Section 149 of the Pakistan Penal Code, it is not necessary to show that the offence committed was identical with the common object of the unlawful assembly, nor is it an essential requirement for such liability that the offence committed must in every case be directly and immediately connected with the prosecution of the common object of the unlawful assembly. The second part of the section would directly come into play where the offence was such as the members of the assembly knew to be likely to be committed in prosecution of that object. When deciding the question of constructive liability it is necessary to consider the effect of both the parts of the section, the second part being of a wider import than the first. However, the question whether all the members of an unlawful assembly are liable for an act committed by one or more of them, is a question of fact which has to be determined in relation to the peculiar circumstances of each case. Where the accused formed themselves into an unlawful assembly and were variously armed with *takwas*, *dangs*, one of them carrying a spear and deliberately launched an assault on the deceased and his companions when they were sitting in the courtyard of a house, causing seventeen injuries to the deceased, and forty-four to his companions, most of the injuries to the deceased being on his head or the adjoining parts of the body with the result that his skull bones were fractured. It was held that whatever the common object of the unlawful assembly formed by the appellants, each of them must be burdened with the knowledge that death was likely to be caused in an assault carried out with such deadly weapons. The members of the unlawful assembly knew, that murder was likely to be committed in the prosecution of the common object of the assembly. All the accused were constructively liable under Section 149, P.P.C. for the offence of murder. **P L D 1981 Lah. 1.**

Application of Section 149 : Prosecution must prove presence and participation of each of the accused in unlawful assembly for conviction under Section 149, Penal Code. **1994 S C M R 588.**

For application of Section 149, P.P.C. it is necessary that accused should be a member of an unlawful assembly, offence should be committed by him in prosecution of common object of that assembly and offence should be of such a nature that the members of the unlawful assembly knew the same to be likely to be committed in prosecution of their common object. **1995 P Cr. L J 2066.**

Ingredients : Following are the important ingredients of the section:-

- (a) unlawful assembly,
- (b) its membership,
- (c) offence committed in prosecution of common object, or
- (d) knowledge of likelihood of the offence being committed 'likelihood' is not the same as 'possibility'.

Principle of constructive liability : The principle behind the enactment of the section is to punish everybody who forms an unlawful assembly to prosecute a common object whether he does some overt act any further or not. The reason is that once it is established that certain person was one of those who formed an unlawful assembly with a certain object, he becomes liable even for the acts done by others. Similar (but not identical) provision is under Section 34 also but there are certain points of difference which we have already dealt with while dealing with Section 34 and they shall be referred to later. Here it is enough to be noted that this section creates a specific offence and made the members constructively liable for the acts of others. The essence of the section lies in sharing the object (as against sharing the common intention under Section 34 and forming unlawful assembly in prosecution of that common object. The principle underlying the section does not admit the plea that no overt act was done by him. Mere membership will devolve liability on to him.

Section 149, P.P.C. being only an enabling provision and not a substantive offence, conviction and sentence of accused thereunder by the Trial Court was misconceived. Conviction of only one of the five accused under Section 302, P.P.C. and conviction of the remaining four accused under Section 307, P.P.C. without the aid of Section 149, P.P.C. showed that neither there was any unlawful assembly nor the accused was a member of such assembly and he, therefore, could not be convicted under Section 148, P.P.C. Accused was consequently acquitted of both the said charges. **P L D 1996 S C 219.**

Section 34 and 149 : The two sections of the Pakistan Penal Code making a person vicariously liable for the acts of his companions, which come before Court more frequently than others are Sections 34 and 149. The former of these makes each one of the culprits liable for the act done if it is established that the act was done in furtherance of the common intention of all of them. That section applies to cases in which whatever the number of the culprits be they less than five, five or more than five, the prosecution can establish that the criminal act was done in furtherance of the common intention of all in which case each one of them is punishable as if he had done the act himself. Section 149, on the other hand, does not deal with a common intention but applies to an offence committed by any member of an unlawful assembly (an assembly of five or more persons, whose common object is one of those mentioned in Section 141, P.P.C.) in furtherance of the common object of the assembly. Section 149 will apply even if the common intention of the culprits was not to commit the offence committed if that offence was committed in order to gain the common object of the unlawful assembly. Sections 34 and 149 have some common features, but one difference between them is that while Section 34 may apply to a case where the culprits are five, more than five or less than five, Section 149 can apply only to cases in which the culprits are five or more. Another difference is that while Section 34 will apply where the common intention is to do an act which was done, the latter section will apply even if there was no common intention

to do the act but it was done in furtherance of the common object of the unlawful assembly. Section 34 applies to cases in which more persons than one intend to do criminal act and that act is done, while Section 149 applies to cases where five or more persons intend to achieve an object but may not have the intention of doing the particular criminal act which was done by one or more of them for the purpose of achieving the common object. If the offence committed is such as the companions of the person who commits it knew to be the likely result of their escapade. Section 149, Pakistan Penal Code will apply and make the persons other than the one, who committed the offence, vicariously liable for it. **P L D 1959 Lah. 405.**

Section 149, P.P.C. deals with the constructive liability of the members of an unlawful assembly for the offence have been committed by one or more of the members of the assembly. **P L D 1971 Kar. 68.**

Infliction of solitary fatal injury or firing of effective shot proving fatal not attributed with certainty to one of two or more assailants whose participation in attack otherwise established by satisfactory evidence. The accused, was entitled to benefit of doubt. Sentence of accused was altered from death to imprisonment for life in circumstances. **1968 P Cr. L J 263.**

The names of the accused excepting two were not mentioned in the F.I.R. by the informant a boy of 16/17 years old. The informant disclosed names of all the accused and report was not recorded faithfully or else names of all accused known to witness M claiming to be eye-witness of occurrence could not be omitted from being recorded. The witness it was of doubtful character for not having produced gun which according to the evidence, he used to defend himself against the accused at the time of occurrence and also failed to deny the registration of the criminal case against him for stealing cotton of an accused. The conduct of the Investigating Officer showed lapses in investigation giving rise to many glaring irregularities, such as, time of recording report, sending of dead bodies to mortuary, etc. Word in F.I.R. also appeared to have been changed as admitted by the investigating officer himself. The gun used in commission of offence belonged to an acquitted accused and no corroboratory evidence was available in respect of the statements of the prosecution eye-witnesses as against the appellants. The accused was connected with the crime by virtue of the statement of Arms Expert and recovery of gun was already left off by trial Court and the High Court. The appellants could not, in circumstances, with responsibility of committing double be saddled murder. The appeal was accepted and the appellants were acquitted of the charge of murders. **1983 S C M R 1211.**

In the circumstances where F.I.R. was lodged late without any excuse and there were only two reliable witnesses while other witnesses did not carry conviction, the Court imposed conviction only on those accused who were found to be the actual killers. Other persons brought as accused under Sections 148 and 149 were acquitted. **P L D 1979 Pesh. 48.**

Contention that Single Judge of High Court while exercising revisional powers went beyond mere vacation of certain findings of fact and recorded clear finding of fact likely to support conversion of finding of "not guilty" into a finding of "guilty" and consequently exceeded his jurisdiction. Points discussed by Judge were amply supported by evidence. Case also was remanded for retrial by Sessions Judge or Additional Sessions Judge other than one whose judgment *set aside* in revision. The Judge also directed that the trial Court should not be influenced by any observation made in his order and should come to its own independent conclusion. The fear in mind of petitioners as to impugned judgment having decided facts one way or other, was without any reasonable ground and observation of Single Judge indicated no conclusive observation having been made with regard to various facts taken into consideration while remaining case for fresh decision. **1983 S C M R 233.**

The trial Court acquitted three out of six accused by giving them benefit of doubt. The High Court on appeal gave benefit of doubt to one more accused. Conviction of the two accused confirmed. The eye-witnesses claimed to have identified all the accused in light of fire raging all around house in question. The contention as to identification of the accused being not possible in circumstances of case was without merit. The eye-witness's claim to have seen

occurrence by concealing themselves at a place which the accused did not see was nothing impossible about such claim. The High Court extended maximum benefit of all principles of criminal justice to the accused party. The High Court applied rule of corroboration because of possible adverse interest of the eye-witnesses and after finding strong corroboration maintained the conviction of the two and acquitted one. The evidence about recoveries was rightly believed. The contention was that guns belonged to the other persons and not accused. Other persons incidentally were also such for whom appellants could have taken such guns, contention was without force. Benefit of doubt having been extended to acquitted accused, appellant's claim to extension of such benefit to them was not sustainable. Nothing was improbable, for the two appellants had joined together in crime in circumstances of case. **1983 S C M R 46.**

Common object of unlawful assembly : Factors to be taken into consideration. Going in a body and attacking the victim not a decisive factor. Two head injuries caused by blunt weapon though some of the assailants were armed with deadly weapons. Victim dying two days later. Assailants not using much force or causing much violence. Other Victim, a one year old child, accidentally receiving head injury which resulted in his death. *Held:* In circumstances of the case, common object of the assembly was not to commit murder but to cause grievous hurt. *Held:* The common object of the unlawful assembly has to be inferred from the membership, the weapons used and the nature of the injuries as well as other surrounding circumstances. Going in a body cannot be a decisive factor in inferring the common object. Many other factors, as mentioned above, have to be taken into consideration. In a given case, the prosecution has to prove that the person concerned was not only a member of the unlawful assembly at some stage but also shared the common object of the unlawful assembly at all the crucial stages. **1995 P S C (Crl.) 415 (a).**

Member of unlawful assembly : Proof of specific overt act not necessary. Sufficient if it is proved that the accused persons shared the common objects of the unlawful assembly and in furtherance of those common objects some members of that unlawful assembly committed offences attributed to them. Tendency to rope in innocent persons due to party factions should be kept in mind. **1996 P S C (Crl.) 873.**

Person retiring from fight has no further common object with those continuing it : A large body of men belonging to one faction waylaid another body of men belonging to a second faction, and a fight ensued, in the course of which a member of the first-mentioned faction, wounded, and retired to the side of the road, taking no further active part in the affray. After his retirement, a member of the second faction was killed. It was *held that* the wounded man had ceased to be a member of the unlawful assembly when he retired wounded and that he could not, under this section, be made liable for the subsequent murder. **P L D 1968 S C 372.**

150. Hiring, or conniving at hiring, of persons to join unlawful assembly : Whoever hires or engages, or employs, or promotes, or connives at the hiring engagement or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment; in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

COMMENTS

Scope : This section seeks to punish a person who hires, engages or employs or connives at the hiring, engagement or employment of any person to join an unlawful assembly. The word "hiring" means engaging for a stipulated reward; while the word "engaging" means employing for a definite purpose. To "promote" is to render active support and assistance; while "conniving" is to close one's eyes to a fault.

In the case of connivance, it should be shown (a) that the accused was legally bound to prevent the hiring; (b) that he was physically able to prevent it; and (c) that he did not prevent it, or do all that lay in his power towards preventing it.

151. Knowingly joining or continuing in assembly of five or more persons after it has commanded to disperse : Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months or with fine, or with both.

Explanation : If the assembly is an unlawful assembly within the meaning of Section 141, the offender will be punished under Section 145.

COMMENTS

Object : This section punishes the person who --

- (1) knowingly joins or continues;
- (2) in any assembly of five or more persons;
- (3) likely to cause a disturbance of public peace;
- (4) after such assembly has been lawfully commanded to disperse.

This section is different from Section 145 which provides for the punishment of a person who joins or continues in an unlawful assembly knowing it has been commanded to disperse. The 'assembly' under this section need not be an 'unlawful assembly'. It must only be an assembly likely to cause a disturbance of the public peace. The section does not apply to cases in which the assembly is unlawful from its inception or has become so before the command for dispersal is given.

152. Assaulting or obstructing public servant when suppressing riot, etc. : Whoever assaults or threatens to assault, or obstructs or attempts to obstruct a public servant in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.

COMMENTS

A person assaulting or obstructing a public servant, or threatening to assault or obstruct him when he is endeavouring to disperse an unlawful assembly, is liable to be punished under this section. The section is intended to prevent the use of force on a public servant in order to obstruct him from discharging his duty.

153. Wantonly giving provocation with intent to cause riot--if rioting be committed; if not committed : Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENTS

'Malignantly' implies a sort of general malice. According to Webster the adverbs 'maliciously' and 'malignantly' are synonymous. Malice is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means an unlawful act done intentionally without just cause or excuse. **4 B & C 247.**

'Wantonly' means recklessly, thoughtlessly, without regard for right or consequences. This word gives to the offence contained in this section a far larger, vaguer and more comprehensive scope, than would be implied by the word 'malignantly' standing alone. It occurs in this section, while the word 'malignantly' occurs once again in Section 270.

If the act is not illegal, however, wanton, however undesirable, however to be deplored the act may have been, there could be no offence committed under this section. Where there is no provision of law which would make the killing of a cow an offence, it is impossible to hold that the act of persons in killing a cow in the open is an illegal act, although it may have been wanton and once which is deplorable. **1952 Cr. L J 449.**

'Illegal' : An offence under this section requires that the offender should do something illegal by doing which he malignantly gives provocation to any person intending or knowing it to be likely that a riot would be the result. **6 A W N 23.**

'Gives provocation to any person' : The provocation should have been given with the intention or knowledge that is likely to cause rioting.

Where a bride and bridegroom of the depressed class rode in palanquins through the villages in spite of the protests of the high caste Hindus, it was *held that* it was not an illegal act for which they could be convicted under this section. **1 L R 58 All. 934.**

Quashing of proceedings : Contents of the F.I.R. by themselves did not give any idea about the evidence collected against the accused. No *prima facie* case existed against the accused for the purpose of deflecting normal course of trial by exercise of inherent jurisdiction. Petition for quashing of proceedings pending against the accused in the Special Court was dismissed *in limine* in circumstances. **1995 PCr. LJ 874 (b).**

1[153-A. Promoting enmity between different groups, etc. : Whoever,--

- (a) by words, either spoken or written, or by signs, or by visible representations or otherwise, promotes or incites, or attempts to promote or incite, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities; or
- (b) commits, or incites any other person to commit, any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities or any group of persons identifiable as such on any ground whatsoever and which disturbs or is likely to disturb public tranquillity; or
- (c) organizes, or incites any other person to organize, and exercise, movement, drill or other similar activity intending that the participants

1. Sec. 153-A subs. by Criminal Law (Amendment) Act, VI of 1973, S. 2.

in any such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in any such activity will use or be trained to use criminal force or violence or participates, or incites any other person to participate, in any such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in any such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste of community or any group of persons identifiable as such on any ground whatsoever and any such activity for any reason whatsoever cause or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,

shall be punished with imprisonment for a term which may extend to five years and with fine.

Explanation : It does not amount to an offence within the meaning of this section to point out, without malicious intention and with an honest view to their removal, matters which are producing, or have a tendency to produce, feelings of enmity or hatred between different religious, racial, language or regional groups or castes or communities].

COMMENTS

Scope : This section has been reconstituted so as to make its scope much larger. Before amendment this section punished promoting or attempting to promote feelings of enmity or hatred between different classes of citizens. The section as it stands after amendment, in addition to the above also makes punishable promoting ill-will between different religious, racial, language or regional groups or castes or common units. It also makes punishable acts prejudicial to maintenance of harmony between such groups, using criminal force or violence against any such group or causing alarm, fear or sense of insecurity among various groups of citizens.

This section punishes for--

- (1) promoting, inciting or attempting to promote or inciting;
 - (a) disharmony, or feelings of enmity or hatred or ill-will;
 - (b) between different religious, racial, language regional groups or castes or communities;
 - (c) by words either spoken or written or by signs or by visible representation or otherwise;
 - (d) on grounds of religion, race, place of birth, residence, language, caste or community or on any other grounds; or
- (2) any act prejudicial to the maintenance of harmony between different groups, a mention of which has already been made above, which disturbs or is likely to disturb the public tranquility;
- (3) an act (mentioned in clause (1) above) to organize any exercise, movement, drill or other similar activities intending that the participants in any such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in any such activity will use or be trained to use criminal force against

any religious, racial, language or regional groups or caste or community to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial language or regional group or caste or community.

A Hindu who ridicules the Holy Prophet Muhammad not out of any eccentricity but in the prosecution of a propaganda started by a class of persons who are not Muslims promotes feelings of enmity and hatred between Hindus and Muslims and is liable to punishment under this section. **A I R 1674 Luck. 694.**

Section 153-A, P.P.C. deals with different "classes" of people and not with different "sects". Primary purpose, for a book to fall within mischief of Section 295-A, P.P.C. must be to outrage maliciously feelings of a particular class. Book containing objectionable reading injuring feelings of Muslims "in general" but not falling either under Section 153-A or Section 295, P.P.C. does not fall within mischief of either section. Publisher offering to delete passages appearing to Court to be offensive the Court point out such passages keeping in view the necessity of preserving research value of such book. **P L D 1962 Lah. 850.**

The words "promotes or attempts to promote feelings of enmity" are to be read as connoting a successful or unsuccessful attempt to promote feelings of enmity. It must be the purpose or part of the purpose of the accused to promote such feelings, and, if it is no part of the purpose the mere circumstance that there may be a tendency is not sufficient.

'Classes' : To bring any body of persons within the description of a 'class' of citizens of Pakistan, the body of persons must possess a certain degree of importance numerically, and must be ascertained with certainty and distinguished from any other class. Every group of persons cannot be designated as a class. **A I R 1940 Bom. 379.**

1[153-B. Inducing students, etc., take part in political activity : Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, induce or attempts to induce any student, or any class of students, or any institution interested in or connected with students, to take part in any political activity which disturbs or undermines, or is likely to disturb or undermine, the public order shall be punished with imprisonment which may extend to two years or with fine or with both].

154. Owner or occupier of land on which an unlawful assembly is held : Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

1. Sec. 153-B subs. by Criminal Law (Amendment) Act, VI of 1973, S. 2.

COMMENTS

Section 45 of the Criminal Procedure Code, imposes upon the owner or occupier of land, and, the agent of any such owner or occupier in charge of the management of that land, the duty of communicating to the nearest Magistrate, or Officer Incharge of a Police Station, any information he may possess respecting the commission of a riot, in or near the village. This section makes a breach of this duty an offence. It contemplates three different breaches of duties as follows :--

- (1) omission to give notice;
- (2) abstention from preventing;
- (3) negligence to suppress.

In the place the section states that the owner of the land, on which a riot or unlawful assembly is committed or held, becomes punishable, if he or his agent or Manager knowing that such offence is being committed, or has been committed or having reason to believe that it is likely to be committed, does not give the earliest notice thereof in his or their power at the nearest Police Station. The second provision makes it punishable on the part of the owner or his agent or manager, if he or they, having reason to believe that a riot was about to be committed, do not use all lawful means in his or their power to prevent it. The third imposes the same penalty, if in the event of a riot taking place he or they do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

155. Liability of person for whose benefit riot is committed : Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

COMMENTS

Under the preceding section the owner of land is punishable for the taking place of an unlawful assembly or riot on his land. This section requires that the unlawful assembly or riot should take place in the interest of the owner or any person claiming interest in the land. The section, therefore, imposes unlimited fine. The preceding section referred to an unlawful assembly as well as a riot; this section refers to riot only.

The principle on which this and the following sections proceed is to subject to fine all persons in whose interest a riot is committed and the agents of such persons, unless it can be shown that they did what they lawfully could do to prevent the offence.

156. Liability of agent of owner or occupier for whose benefit riot is committed : Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which give rise to the riot, or who has accepted or derived any benefit therefrom,

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

COMMENTS

Scope : To constitute an offence under this section, it must be shown by legal evidence:

- (1) that a riot was committed;
- (2) that the riot, committed, was committed for the benefit of the accused; and
- (3) that the accused had reason to believe that a riot was likely to be committed.

This last fact can seldom be proved by direct evidence and can be inferred only from the circumstances. As such it is incumbent upon those who are entrusted with the exercise of these powers not to act upon inferences or suspicion but upon evidence.

157. Harbours persons hired for an unlawful assembly : Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any persons knowing that such persons have been hired, engaged or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENTS

Object : This section, as compared with Section 150 is of a wider application. It provides for an occurrence that may happen and makes the harbouring, receiving or assembling, of persons who are likely to be engaged in any unlawful assembly, an offence. It contemplates the imminence of an unlawful assembly and the proof of facts which in law would go to constitute an unlawful assembly. It refers to some unlawful assembly in the future and provides for an occurrence which may happen not which has happened. An act of harbouring a person, with the knowledge that, in some time past, he had joined or was likely to have been a member of an unlawful assembly is not an offence under this section.

158. Being hired to take part in an unlawful assembly or riot : Whoever is engaged or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in Section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

or to go armed : and whoever, being so engaged or aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section is intended to punish those persons who hire themselves out as members of an unlawful assembly or assist any such members. It is divided into two parts. Higher penalty is awarded where the accused is armed with a deadly weapon.

159. Affray : When two or more persons, by fighting in a public place, disturb the public peace, they are said to "commit an affray".

160. Punishment for committing affray : Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

COMMENTS

An affray is the fighting of two or more persons in a public place to the terror of the public. It is an offence against the public peace since it causes, public alarm. Mere use of quarrelsome or threatening words however do not amount to an affray. **1 Hawk, S. 2.**

'Two or more persons' : An affray requires two sides fighting, passive submission by one party to a beating by the other will not do. **P L D 1959 Lah. 1018.** Nor will mere howling in pain do. An answering challenge or war cry or even an active non-violent resistance might do. Where a person does not resist back violently or non-violently when he is beaten by others, the latter cannot be convicted under this section.

'Public place' : A public place is one where the public go, no matter whether they have a right to go or not.... Many shows are exhibited to the public on private property, yet they are frequented by the public--the public go there. Railway platforms, theatre halls, open spaces resorted to by the public for recreation, amusements, etc., open field with no compound wall an omnibus, a railway platform, public urinal, a goodsyard of a Railway Station, an unfenced compound, and harbour premises are public places. If people gather as a matter of right in a particular place it may become a public place but it will not necessarily become a thoroughfare unless used as a passage for people to pass through. It has to be established that the site is actually used as a path by the members of the public. **1950 Cal. L R 584.**

But a private *chabutra* adjoining a public thoroughfare, a Railway Station and platform at a time when no train is due except a goods train and a private garden, are not public places.

Disturbance of public peace : It is essential that there must be a disturbance of the public peace. The offence under this section postulates the commission of a definite assault or breach of the peace. Mere quarrelling in a street over money matters without exchange of blows is not sufficient.

Affray and riot--Distinction : An affray differs from a riot. The former cannot be committed in a private place, and does not require five or more persons; the latter requires at least five persons, and can be committed in a private place.

Affray and assault--Distinction : An affray must be committed in a public place; but assault may take place anywhere. An affray is regarded as offence against the public peace but assault against an individual. Passive submission to heating by one side is not affray. **P L D 1959 Lah. 1018.**

CHAPTER IX

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS

This Chapter deals with two classes of offences, of which one can be committed by public servants alone, and the other comprises offences which relate to public servants though they are not committed by them.

The fact that transgression by a public servant may always be punished by dismissal from the public service explains the comparative leniency of some of the punishment provided by this Chapter and the absence of any notice of certain malpractices.

161. Public servant taking gratification other than legal remuneration in respect to an official act : Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Federal, or any Provincial Government or Legislature or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both.

Explanation : "**Expecting to be a public servant**": If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

"Gratification" : The word "gratification" is not restricted to pecuniary gratifications, or to gratifications estimable in money.

"Legal remuneration" : The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the authority by which he is employed, to accept.

"A motive or reward for doing" : A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has done, comes within these words.

['Public servant' : In this section and in Sections 162, 163, 164, 165, 166, 167, 168, 169 and 409, 'public servant' includes an employee of any corporation or other body or organisation set up, controlled or administered by, or under the authority of, the Federal Government.]

Illustrations

(a) A, a munsif, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a case in favour of Z. A has committed the offence defined in this section.

1. Added by the Prevention of Corruption Laws (Amendment) Act, XIII of 1977, S. 2 and Sch.

(b) A, holding the office of Consul at the Court of a Foreign Power accepts a lakh of rupees from the Minister of that Power. It does not appear, that A accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to that Power with the Government of Pakistan. But it does appear that A accepted the sum as a motive or reward for generally showing favour in the exercise of his official functions to that Power. A has committed the offence defined in this section.

(c) A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.

COMMENTS

Scope : This section relates to the offence of what is popularly known as bribery. This section provides for the punishment of a public servant taking, agreeing or attempting to take, a bribe. The fact that the public servant is *functus officio* when money is offered to him as a bribe would not, by itself and as a matter of law, be sufficient to negative the offence under this section and this circumstance is not sufficient to entitle the accused to an acquittal. **P L D 1960 Pesh. 41.** However, such fact may have, in any particular case, an important bearing on the question whether the gratification offered or accepted was intended to be or was believed or held out to be for an official act. To constitute an offence under this section, it is not necessary that the public servant must be capable of doing favour. **P L D 1959 Pesh. 166.**

A charge under this section may be lightly made but is difficult to establish, as direct evidence in most cases is meagre and of a tainted nature. These considerations cannot, however, be suffered to relieve the prosecution of any part of the burden which rests upon it to establish the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.

Public servant : A person who *de facto*, though wrongly, discharges the duties of an office through which he apparently figures as a public servant, may be tried for setting a bribe. A public servant who has gone on leave does not cease to be a public servant. **A I R 1917 All. 81.**

'Obtains or attempts to obtain or agrees to accept' : A mere asking is sufficient to constitute an attempt. It is not necessary for the prosecution to show how the illegal gratification came to be demanded or obtained, so long as it can be clearly established by evidence that it was obtained.

The conduct of accused caught red-handed with bribe-money was not such as to have annoyed raiding Magistrate so much as to exaggerate his role in receiving money. Subsequent conduct of such accused in his refusal to accompany raiding party or to record statement before Magistrate, cannot be taken advantage of by accused so as to cast doubt on credibility of members of raiding party. Prosecution witnesses including Magistrate, having no *animus* against accused, giving a version totally different from that of accused and such version of prosecution accepted by Courts below that complaint had been motivated to false involve other accused. Such explanation given at trial a mere afterthought and not put to any prosecution witnesses. No reasons, were to interfere with assessment of evidence made by Courts and accused accepting tainted money having been caught red-handed rightly convicted. **P L D 1981 S C 102.**

Gratification and legal remuneration : 'Gratification' includes all gratifications of appetite and all honorary distinctions. Even where the payment paid is in the nature *Dasturi* in order to secure the Government contract, the payment comes within the mischief of this section. **27 Cr. L J 872.**

The word 'gratification' has been defined to be not only pecuniary gratification or to gratifications estimable in money. It means any kind or even service may come within the term 'gratification'. The words 'legal remuneration' are not restricted to remuneration which a public servant can lawfully demand, but this term include all remuneration which he is permitted by the authority by which he is employed. When the money was not recovered from the person of the person but was lying on the ground and witnesses differed in their version benefit of doubt was given to the accused. **P L J 1982 Cr. C 185**. The accused was convicted for accepting bribe. Since the complainant did not support the prosecution he was declared hostile. Except the raiding Magistrate, no other member of the raiding party was examined. Deposition of the Magistrate was held to be incomplete and not making out complete picture constituting offence beyond doubt in the circumstances, it was *held that* the prosecution failed to establish its case. **P L J 1982 Cr. C. 15**.

Accused, a Revenue Patwari, received the illegal gratification for supplying copy of Jamabandi to the complainant. The case was pending against the accused for last nearly seven years. Sentence was rendered to period already undergone, in circumstance. **1982 P Cr. L J 208**.

Motive or reward : Bribe must be obtained as a "motive or reward". The words will not allow a public servant to justify his acceptance of gift or bribe by urging that the order passed by him was nevertheless a just one and against the very person from whom he had received the bribe. When a bribe has been given it is immaterial to inquire what effect, if any, the bribe had on the mind of the receiver. If a person accepts money as a motive or reward for an act which cannot be said to be an official act, he is not guilty under this section. **1952 Cr. L J 1118**.

Bribe-giver is an interested witness. Conviction based on testimony of bribe-giver alone in absence of any uninterested corroborative evidence is not safe. **1977 P Cr. L J 256**.

Scheduled Officers : Ocular evidence regarding presence of the witnesses at the time of demand or actual payment of the bribe was contradictory. Question of inducement of the accused to the complainant for entering or cancellation of the mutation in the attending circumstances could not arise. Neither any raid was conducted nor any recovery was effected. Matter was reported to the police with a delay of one year and the witnesses were collaterals. Accused being a public servant charged with the offence falling in the category of "Scheduled Offences" under the Punjab Anti-Corruption Establishment Rules, 1985 framed under Section 6 of the Anti-Corruption Establishment Ordinance, 1961, case against him could not have been registered by the local police. Accused was acquitted accordingly on merits as well as on law. **1998 P Cr. L J 64**.

Official act : It means an act or omission in connection with official functions. The expression "official act" should be given in the context. Section 161, the widest meaning which the words will carry. A Telegraphs official undertaking to destroy the original telegram before the due date in return for receipt for money is covered by the expression. **P L D 1950 S C 50**.

Accused though was not capable of demolishing a certain structure yet was an official of Municipal Corporation charged with duties of like authority. Acceptance of illegal gratification by such official on assuring complainant of his capability to demolish the structure if latter paid him a particular amount is sufficient to constitute offence. Real power in accused to render such service and complainant's belief in that regard is not necessary. **1975 S C M R 457**.

Who is an accomplice : The mere presence of a person on the occasion of the giving of bribe, and his omission to promptly inform the authorities, do not constitute him an

accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment. **A I R 1919 Lah. 284.**

Abetment, what amounts to : A person offering a public servant an illegal gratification for any of the purposes stated in the section is liable for abetment of an offence under this section. If the bribe is accepted, the public servant is punishable under Section 161 and the giver of the bribe under that section read with Section 109. If the bribe is not accepted, the public servant commits no offence, but the person who offers the bribe is still punishable under Section 161 read with Section 116.

Benefit when available to accused : Principle that benefit should go to an accused where conversation at the time of passing on the bribe money to accused is not overheard by the raiding Magistrate is not a principle of law, but is only a rule of prudence and caution and is not of universal applicability. Said principle is attracted only in rare cases like where an accused candidly admits receipt of money at the outset and claims *bona fides* which are, as the onus shifts on to him under the law, shown to exist with reasonable elements of certainty conduct of accused is thus very relevant in such cases. **1995 PCr. LJ 1 (a).**

Prevention of Corruption Act, 1947 : This enactment generally deals with various misconducts of public servants. This Act also makes bribery an offence, Section 5 (1), clauses (a) and (b) of this Act are aggravated forms of Sections 161 and 162 of the Penal Code. In order to bring the charge home to the accused under the Prevention of Corruption Act it is necessary that the public servant while misconducting himself should have done so in the discharge of his duty. This section of the Act does not repeal Section 161 or 162 of the Penal Code. Both can co-exist together.

Raid was organised by Anti-Corruption Establishment under supervision of area Magistrate and tainted money was recovered from accused's possession. Tainted money having been recovered from accused, onus thereafter shifted upon him to explain how he received it. **1977 S C M R 503.**

Currency notes, their numbers, noted by anti-Corruption Staff was passed on to accused official and recovered from his possession by raiding party inclusive of a Magistrate. Police Inspector and Magistrate not being in uniform and being dressed like ordinary persons, accused's contention that he could not receive bribe in their presence nor was sustainable. Non-production of witnesses of locality is not fatal to prosecution case and witnesses of locality seldom are taken up in raid cases, fact of prosecution witnesses being interested in success of raid. No pointer to their being *ipso facto* interested in involving innocent persons. Accused refusing to make a statement before raiding Magistrate and choosing to do it only towards end of cases. Accused's explanation regarding receipt of money was not acceptable being just an afterthought. **P L D 1977 Lah. 899.**

After the passing of the Prevention of Corruption Act, 1947, no Court can take cognizance of an offence under this section without the sanction of competent authority.

Fact that raiding Magistrate and accompanying Police Officer had not seen passing of bribe money or had not heard conversation between complainant and accused would become insignificant when all P.Ws. have deposed that tainted money was recovered from possession of accused and this fact is also admitted by accused. **N L R 1996 Criminal 270 (a).**

Where a *Patwari* demanded Rs. 20 for doing a copy of the *Khatauni*, and was caught red-handed by the raiding party having recovered two ten-rupee notes of which the numbers

were noted and were handed over to the complainant for giving the same to appellant *Patwari*. After completing the usual investigation the case was tried by Additional District Magistrate/Anti-Corruption Special Judge. The evidence supported the prosecution case and the appellant was convicted. The currency notes procured in recovery were the same as supplied to the complainant for trapping the appellant. The appellant could not establish enmity with the witness. In the circumstances it was *held that* there was no error of law in concurrent findings of two Courts below. The appeal was dismissed. **1980 S C M R 3**. The petitioner demanded Rs. 1,000 for the release of the complainant. Rs. 500 were paid whereupon the complainant was released. The complainant was to pay the balance of Rs. 500 a few days later, but before paying it, he reported the matter to Anti-Corruption Organization and raid was arranged. The petitioner alongwith another came to the appointed point where the marked currency notes were handed over to him. The witnesses who appeared on behalf of the prosecution fully supported the prosecution and also members of the raiding party corroborated except one witness who was the *mushir* of the marked notes. The trial Court as well as the appellate Court *held that* the evidence produced was sufficient to prove the petitioner's guilt and the only question which required consideration was to find out any error of law in the concurrent findings of two lower Courts. It was *held that* the appellant's presence at appointed time in the house of the complainant and the recovery of marked currency notes was sufficient to establish the guilt of the accused. Another plea raised by the Counsel of the appellant that petitioner's conviction was bad because he has been prosecuted without obtaining the appropriate Government sanction. It was *held that* as the plea had not been raised in the Courts below it was not fit to be examined at the appellate stage. **1980 S C M R 3**. The petitioner a Line Superintendent, Electricity, WAPDA demanded and accepted Rs. 1,500 as illegal gratification for showing favour to one Waris Khan for installation of electric connection. On complaint a raid was arranged and Rs. 1,500 paid by K as illegal gratification to the Line Superintendent were recovered from the possession of the petitioner. The petitioner admitted the recovery of Rs. 1,506 but pleaded that the said amount was given to him by K as friendly loan. He could not produce any witness in support of his contention. The Special Judge convicted the petitioner observing "the statement of K complainant who is not proved to have any grudge or unduly biased against the accused is quite consistent and supports the case of the prosecution.....and the mere fact that some of the witnesses have stated that they did not hear the conversation that took place between the accused and the complainant does not affect the prosecution case to any material extent which otherwise stands proved. In trap it is somewhat quite impossible that the conversation that takes place between the accused and the witness is heard by other members of the raiding party who remain within hearing distance". On re-appraisal of the evidence the learned Single Judge in the High Court was convinced in view of the newly constructed house the complainant approached the accused and thus his alteration that he had paid Rs. 1,500 as illegal gratification was correct. It was *held that* since charge under Section 161, P.P.C. was based on very cogent evidence produced by the prosecution, the defence plea that the accused was acquitted on the charge under Section 5 (2) of the Prevention of Corruption Act, 1947 is irrelevant. **1981 S C M R 871; P L J 1982 S C 684**.

The raid was not conducted under supervision of Magistrate and conversation between complainant and accused which proceeded while passing of tainted money not heard by Police Inspector. Reasonable possibility of defence version being true was not ruled out. Testimony of complainant that tainted currency notes were given to accused as illegal gratification was uncorroborated. Prosecution, was failed to prove its case beyond reasonable doubt. Accused was given benefit of doubt and was acquitted. **1984 P Cr. L J 3181**.

Where ocular testimony amply corroborated and prosecution case established both on point of demand of bribe and seizure of currency notes from petitioner. The conviction was maintained. **1982 S C M R 154.**

Burden of proof : Burden of proof on 'prosecution in such cases is very light to establish the guilt of the accused and on the recovery of tainted money from the accused onus shifts upon him to explain how he had received the said money. If the accused gives a plausible explanation he would be entitled to acquittal, but if such explanation is unsatisfactory, unconvincing and absurd it would be presumed that he had received the money as illegal gratification. **P L D 1996 Lah. 17 (b).**

Onus : Under the law there is a presumption that when money has been actually passed to a public servant there is an onus on him to establish that it was not for an illegitimate purpose. Even then, if there is a doubt on the case as a whole the benefit of that doubt must be given to the accused persons in the present case, however, that question does not really arise. Before the presumption can arise the prosecution must establish that the money in fact was passed and the doubts are such as Court consistently establish that the money was passed at all. In these circumstances it is obviously impossible to sustain the conviction. **1974 P Cr. L J Note 59 at p. 38.**

Maxim "Nemo debet esse iudex in propria causa" (no man shall be a judge in his own cause) is one of cardinal principles of natural justice. Petitioners were tried and convicted by a Court presided over by an officer, such officer accompanying raiding party and in fact instrumental in raid and arrest of petitioners. Serious and material error in proceedings, was held to have been occasioned and conviction and sentence were liable to be set aside. The appearance of bias is as seriously regarded by supervising Court as actual bias. Judge appearing to have or having a bias may have most excellent and upright motives and may not in fact allow his judicial discretion to be impaired in any way by such vitiating interest. Court will, nevertheless, find breach of natural justice since justice should not only be done but should manifestly and undoubtedly be seen to be done. **P L D 1979 Lah. 284.**

Leave to appeal : Leave to appeal was granted by Supreme Court to consider whether the accused could be tried jointly with his co-accused from whom "Charas" was allegedly recovered, for the offence of offering bribe on a different date, and whether the offence of offering bribe could be said to have been committed in the course of the same transaction in which the recovery of "Charas" had been made. **1998 S C M R 2444.**

162. Taking gratification, In order by corrupt or illegal means to influence public servant : Whoever accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Federal or any Provincial Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

Scope : Under Sections 162 and 163, Penal Code the essential ingredient of the offence is that the gratification should have been received "as a motive or reward for inducing" either by corrupt or illegal means or by personal influence, any public servant to do or to forbear to do an official act or to show favour or disfavour to any person. The gist of the offence under these sections lies in this that the money should have been obtained for the avowed purpose of inducing a public servant either by corrupt or illegal means or by the exercise of personal influence to do or to forbear from doing an official act or to show favour or disfavour to another person. It is not essential that any actual attempt should have been made to corrupt a public servant by illegal means or that personal influence should have been brought to bear upon a public servant, but all that is necessary is that the giver of the money should have paid the money as a motive or reward for so including a public servant, *i.e.*, acting in the belief that the person taking the money would either corrupt a public servant by illegal means or induce by him the exercise of his personal influence to show favour or disfavour to the giver of the money. **P L D 1971 S C 467.**

A conviction under this section cannot be bad if the evidence does not show the person or persons from whom the gratification was obtained, or the public servant to be influenced in the exercise of his public functions. **P L D 1961 Dacca 798.**

In a prosecution for illegal gratification imposition of fine not less than gain derived by accused is imperative. Fact that gain was temporary and recovered by Anti-Corruption Police in course of trap, makes no difference. **P L D 1965 Kar. 579.**

Sentence, enhancement of : Accused had faced the agony of the protracted trial for five years. Sentence of fine of Rs. 50 imposed upon the accused by Trial Court in circumstances was sufficient to meet the ends of justice. Revision petition filed by the State for enhancement of accused's sentence was dismissed accordingly. **1994 P Cr. L J 1846.**

Illegal gratification--Sentence--Challenged to : Contradiction between the statements of the prosecution witnesses. No question has been put to the accused/appellant under the provisions of Section 342, Cr.P.C. in respect of the allegation that he had promised to influence the Investigating Officer on behalf of the complainant, which further weakens the case of the prosecution against the appellant. It is not the case of the prosecution itself that any money had been passed on to the S.H.O. concerned or any attempt had been made to influence him in the investigation of the case in question and that in fact the allegation as set up by the prosecution against the appellant amounts to simple misappropriation of money in question even if it is accepted without being challenged in any manner and that under such circumstances no offence shall be made out under the provisions of Section 162 of P.P.C. **K L R 1994 Cr.C. 569; 1995 P Cr. L J 236.**

163. Taking gratification, for exercise of personal influence with public servant : Whoever accepts or obtains or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Federal or any Provincial Government or Legislature, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration

An advocate who receives a fee for arguing a case before a Judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the service and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust, --- are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

COMMENTS

Where the accused accepted money from A for attempting to abet the acceptance by the wife of a public servant of a sum of money with a view to inducing her to induce her husband to show favour to A in the exercise of his official functions and there was proof that there was an offer of money but not of actual payment to her. It was *held that* the accused was guilty under this section and Section 161.

164. Punishment for abetment by public servant of offences defined in Section 162 or 163 : Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Illustration

A is a public servant. B, A's wife receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

COMMENTS

Scope : This section provides for abetment of the offence of taking illegal gratification when the person who takes or agrees to take or asks for a bribe is not a public servant but he is abetted by a public servant. As the illustration to the section indicates, if the public servant knowingly enjoys the benefit of the gratification received by his wife, he is liable to be punished under this section. The section does not apply where the public servant himself accepts or asks for a bribe.

165. Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant : Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate,

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate,

or from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Illustrations

(a) A a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty rupees a month, the house being such that, if the bargain were made in good faith, A would be required to pay two hundred rupees a month. A has obtained a valuable thing from Z without adequate consideration.

(b) A, a Judge, buys of Z, who has a case pending in A's Court, Government promissory-notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(c) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

COMMENTS

Scope : This section does not prohibit a sale or purchase by a public servant, at a fair price, to or from person transacting business before him.

If a person being in any way connected with the official functions of a public servant, induces him to accept anything for an inadequate consideration, he abets the offence mentioned in this section.

Under Section 161 the gratification is taken as a motive or reward for doing or forbearing to do an official act; under this section the question of motive or reward is not material as the section prohibits taking of a thing without consideration from a person having any connection with the official functions of the public servant.

An attempt was made to pay illegal gratification to the wife of a public servant with a motive to her for influencing her husband for showing favour to the accused in the exercise of official functions, it was *held that* the offence does not fall under this section. **P L D 1977 Lah. 226.**

¹[165-A. Punishment for abetment of offences defined in Sections 161 and 165 : Whoever abets any offence punishable under Section 161 or Section 165 shall, whether the offence abetted is or is not committed in consequence of the abetment, be punished with the punishment provided for the offence].

COMMENTS

Scope : This section provides for the punishment of an abetment of an offence punishable under Section 161 or Section 165, even if offence is not committed in consequence of the abetment. Where the accused wanted that the public servant in his official capacity should assist him and for that reason he made an offer to pay him some cash, the accused was held guilty of an offence under this section. The offence must be committed with reference to an official act. **1971 D L C 87.**

Where Government servant was not in a position to show "favour or disfavour to accused in exercise of his official functions" the money offered to him, was *held*, that not have

¹ Sec. 165-A ins. by the Criminal Law (Amendment) Act, XXXVII of 1953.

paid as a motive or reward for doing any official act and no offence under Sections 165-A/109 are brought home to accused. **1971 P Cr. L J 123.**

1[165-B. Certain abettors excepted : A person shall be deemed not to abet an offence punishable under Section 161 or Section 165 if he is induced, compelled, coerced, or intimidated to offer or give any such gratification as is referred to in Section 161 for any of the purposes mentioned therein, or any valuable thing without consideration, or for an inadequate consideration, to any such public servant as is referred to in Section 165].

COMMENTS

Where bribe is obtained through threats the bribe-giver is an "abettor" notwithstanding that bribe was paid under threats in Section 165-B, Penal Code, 1860 only a special exemption in favour of such abettor absolving him of liability. **P L D 1964 S C 266.**

Police Officers laid trap to catch a bribe-giver, the bribe-giver's impression was that Police was being "kind" to him and meeting him "separately". Such conduct of Police, if any, was not an inducement to give bribe. **P L D 1964 S C 266.**

"Final action" of bribe-giver was influenced by Police Inspector saying (in course of trap) that bribe-giver "was free to pay the bribe to Police Sub-Inspector, if the latter would accept it". The statement was held to be "equivocal" and given weight in matter of sentence. Sentence was reduced. **P L D 1964 S C 266.**

166. Public servant disobeying law, with intent to cause injury to any person : Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this section.

COMMENTS

A wilful departure or disobedience from the directions of the law with the intention that such disobedience will cause injury to any person is punishable under this section. To prove the offence under this section, there must be a wilful disobedience of an express direction of the law. A mere breach of departmental administrative instructions or rules will not bring a public servant within the purview of this section. For prosecuting a public servant, sanction from appropriate authority is necessary. As such no Court can take cognizance of an offence under this section without obtaining sanction of the appropriate competent authority, since the offence under this section is triable under the provisions of the Pakistan Criminal Law Amendment Act, 1958. **A I R 1958 Lah. 519.**

1. Sec. 165-B inst. by the Pakistan Penal Code (Amendment) Ordinance, LIX of 1962.

167. Public servant framing an incorrect document with intent to cause injury : Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

Scope : This section deals with framing an incorrect document with intent to cause injury. The gist of the offence consists in an intention to cause injury to any person by a perversion of official duty.

This section like the preceding Section 166 is intended to punish acts of official perversity and not those of mere incompetence. Those public servants who from their base or corrupt motives prostitute their office by preparing an incorrect document are punished under this section.

'Intending thereby to cause' : Where an act is in itself indifferent, but if done with a particular intent becomes criminal, there the intent must be proved and found: but where the act is in itself unlawful....the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies criminal intent.

The accused, a village Patwari, prepared an incorrect copy of an entry in his *roznamcha* for a plaintiff in a civil suit. The entry related to a contract between the plaintiff and another. It was *held that* the accused had committed an offence under this section of framing an incorrect document. (1872) P R No. 26 of 1872.

168. Public servant unlawfully engaging in trade : Whoever, being a public servant, and being legally bound as such public servant not to engage in trade, engages in trade shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

COMMENTS

Scope : This section prohibits trade by public servants if under the law he is prohibited from doing so. Trade means "any business carried on with a view to profit". This section is in a way incomplete without the assistance of some other enactment or rule of law which imposes the legal prohibition required. P L D 1961 Lah. 684.

Lending money at interest does not, however, amount to unlawfully engaging in trade. Where a public servant lent money to others for buying wheat in the absence of proof that he had set up a shop for its sale or purchase, it was *held that* he was not liable under this section.

169. Public servant unlawfully buying or bidding for property : Whoever, being a public servant, and being legally bound as such public servant, not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the name of another, or jointly, or in shares with other, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

COMMENTS

Scope : This section is an extension of the principle enunciated in the last preceding section. It provides punishment for those public servants who are legally not entitled to purchase or bid for certain property, and if they indulge in such purchase or bidding for the property either in their own name or in the name of other people or jointly, they make themselves liable for prosecution.

170. Personating a public servant : Whoever, pretends to hold any particular office as a public servant, knowing that he does not hold such office or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under colour of such office, shall be punished with imprisonment of either description, for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section punishes a person who pretends to hold any public office as a public servant or falsely personates any other person holding such office, and does any act in the assumed character of a public servant.

Ingredients : The section requires two things --

1. A person (a) pretending to hold a particular office as a public servant, knowing, that he does not hold such office, or (b) falsely personating any other person holding such office.

2. Such person in such assumed character must do or attempt to do an act under colour of such office.

An act is done 'under colour' of an office, if it is an act having some relation to the office, which the actor pretends to hold. If it has no relation to the office, as when A pretending to be a servant of Government travelling through a district, obtains money, provisions, etc., the offence may amount to cheating under Section 415, but is not punishable under this section.

171. Wearing garb or carrying token used by public servant with fraudulent intent : Whoever, not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description, for a term which may extend to three months, or which may extend to two hundred rupees, or with both.

COMMENTS

Intention is the gist of the offence under this section. Where the accused was found carrying a police jacket under his arm, with intent that it should be believed that he was police constable, it was held that he committed no offence under this section as he was not wearing the jacket.

Under Section 140 the wearing of the garb or carrying of the token of a soldier is made punishable. This section relates to posing as a Government servant instead of soldiers by carrying token or wearing the garb of such a public servant, for example, presenting as a Sub-Inspector of Police.

OF OFFENCES RELATING TO ELECTIONS

This Chapter relates to offences committed in respect of election. Under the Article 222 of the Constitution of 1973, parliament may frame laws relating to the conduct of elections, matters relating to corrupt practices and offences against elections, and such laws have already been framed.

It was thought desirable that advantages should be taken of the opportunity to make election offences part of the general law of the land, not only in respect of Legislative bodies, but also in the case of election to public bodies generally.

The present Chapter, therefore, "seeks to make punishable under the ordinary penal law, bribery, undue influence and personation and certain other malpractices at elections not only to the Legislative bodies, but also to membership of public authorities where the law prescribes a method of election; and further, to debar persons guilty of such malpractices from holding positions of public responsibility for a specified period.

171-A. "Candidate", "Electoral right" defined : For the purposes of this Chapter--

- (a) "candidate" means a person who has been nominated as a candidate at any election and includes a person who, when an election is in contemplation, holds himself out as a prospective candidate thereat: provided he is subsequently nominated as a candidate at such election;
- (b) "electoral right" means the right of a person to stand, or not to stand as, or to withdraw from being, a candidate or to vote or refrain from voting at an election.

COMMENTS

Election : The word "election" has been defined in Section 21, Explanation 3. Popularly it means selection of proper representatives in democratic institutions. Electoral right means not only to stand or not stand as a candidate but also to vote or not vote at an election.

171-B. Bribery : (1) Whoever--

- (i) gives a gratification to any person with the object of inducing him or any other person to exercise any electoral right or of rewarding any person for having exercised any such right; or
- (ii) accepts either for himself or for any other person any gratification as a reward for exercising any such right or for inducing or attempting to induce any other person to exercise any such right, commit the offence of bribery:

1. Chapter IX-A ins. by the Election Offence and Inquiries Act, XXXIX of 1920.

Provided that a declaration of public policy or a promise of public action shall not be an offence under the section.

(2) A person who offers, or agrees to give, or offers or attempts to procure, a gratification shall be deemed to give a gratification.

(3) A person who obtains or agrees to accept or attempts to obtain a gratification shall be deemed to accept a gratification, and a person who accepts a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, shall be deemed to have accepted the gratification as a reward.

COMMENTS

Bribery : This section which defines the offence of bribery at an election includes within the ordinary conversation of the term "bribery" offers or agree to give or offer and attempts to procure a gratification for any person.

Same is the case with paying a voter's debt; permitting a voter to shoot rabbits on the estate of the candidate, paying travelling expenses of a voter on condition that he must vote for the payer.

Paying rates and taxes of a voter; payment made to keep away voters from voting, payment to a voter for loss of time, offering money to a rival candidate for withdrawing his candidature, are all instances of bribery.

Treating also amounts to bribery if refreshment is given or accepted with the intent required by the law. Treating of non-electors so that they might influence voters or of women in order that they might influence their fathers or brothers would also amount to bribery.

171-C. Undue influence at election : (1) Whoever voluntarily interferes or attempts to interfere with the free exercise of any electoral right commits the offence of undue influence at an election.

(2) Without prejudice to the generality of the provisions of sub-section (1), whoever--

(a) threatens any candidate or voter, or any person in whom a candidate or voter is interested, with injury of any kind, or

(b) induces or attempts to induce a candidate or voter to believe that he or any person in whom he is interested will become or will be rendered an object of Divine displeasure or of spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or voter, within the meaning of sub-section (1).

(3) A declaration of public policy or a promise of public action, or the mere exercise of a legal right without intent to interference with an electoral right, shall not be deemed to be interference within the meaning of this section.

COMMENTS

Undue influence : The phrase "undue influence" denotes something legally wrong or violative of a legal duty. In order to establish undue influence it must be proved that the influence was such as to deprive the person affected of the free exercise of his will. An advice, argument, persuasion or solicitation will not, however, amount to undue influence.

171-D. Personation at elections : Whoever at an election applies for a voting paper or votes in the nature of any other person, whether living or dead, or in a fictitious name, or who having voted once at such election applies at the same election for a voting paper in his own name, and whoever abets, procures or attempts to procure the voting by any person in any such way, commits the offence of personation at an election.

COMMENTS

Personation at elections : This section defines personation at elections. The offence is punishable under Section 171-F. A decision in an election case can be given only on positive and affirmative evidence and not on mere surmises and suspicions however strong they are. The essence of the offence of false personation is the offender pretending to be other than what he really is. The gist of the offence being false personation, this section does not come into play when the candidate or his agent does not claim to be the voter himself.

171-E. Punishment for bribery : Whoever commits the offence of bribery shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both:

Provided that bribery by treating shall be punished with fine only.

Explanation : 'Treating' means that form of bribery where the gratification consists in food, drink, entertainment, or provision.

COMMENTS

This section prescribes the punishment which should be inflicted for the offence of bribery and treating. (S. 172-B). Bribery by treating is punishable with fine only.

171-F. Punishment for undue influence or personation at an election : Whoever commits the offence of undue influence or personation at an election shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENTS

This section specifies the punishment of undue influence at an election (S. 171-C) or personation at an election. (S. 171-D).

Where a voter who was not present at a polling station was personated by his brother and the candidate in whose favour he voted attested the identity slip vouchsafing that the person who had appeared at the polling station was the voter himself, it was held that there was a deliberate offence of abetment of false personation.

171-G. False statement in connection with an election : Whoever with intent to affect the result of an election makes or publishes any statement purporting to be a statement of fact which is false and which he either knows or believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate shall be punished with fine.

171-H. Illegal payments in connection with an election : Whoever without the general or special authority in writing of a candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees:

Provided that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate.

171-I. Failure to keep election accounts : Whoever being required by any law for the time being in force or any rule having the force of law to keep accounts of expenses incurred at or in connection with an election fails to keep such accounts shall be punished with fine which may extend to five hundred rupees].

¹[171-J. Inducing any person not to participate in any election or referendum, etc. : Whoever by words, either spoken or written, or by visible representations, induces or, directly or indirectly, persuades or instigates, any person not to participate in, or to boycott, any election or referendum, or not to exercise his right of vote thereat, shall be punishable with imprisonment of either description for a term which may extend to three years, or with fine which may extend to five lac rupees, or with both].

1. Sec. 171-J, inst. by the Criminal Law (Third Amendment) Ordinance, LIV of 1984.

CHAPTER X

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS

This Chapter contains those penal provisions which are intended to enforce obedience to the lawful authority of public servants. Contempts of the lawful authority of Courts of Justice, of officers of police, and of other public servants are punishable under this head. The penalties prescribed in this Chapter for particular offences obstructive of judicial proceedings must not be taken to interfere with other powers possessed by Courts of Justice and public functionaries to enforce their orders. They will not affect other coercive powers of the Courts of Justice to compel performance of their orders and decrees, whether by attachment and sale of property, by imprisonment or otherwise.

172. Absconding to avoid service of summons or other proceeding : Whoever absconds in order to avoid being served with a summons, notice or order proceeding from any public servant legally competent, as such public servant, to issue such summons, notice or order, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons or notice or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Scope : This section punishes the evasion of those orders which become binding from the moment they are served. It does not apply to orders which become binding without any kind of special service.

The second clause applies where the summons, notice or order is (1) for attendance in Court; or (2) for production of a document.

Object : The object of this section is to punish an offender for the contempt his conduct indicates of the authority whose process he disregards. The absconding must be with the intention of evading service.

Ingredients : The section requires two things :

1. Absconding in order to avoid being served with a summons, notice or order.
2. Such summons, notice or order must proceed from a public servant legally competent to issue it.

Absconds in order to avoid being served with a summons, notice or order : The "term 'abscond' is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense are to hide oneself; and it matters not whether a person departs from a place or remains in it, if he conceals himself; nor does the term apply only to the commencement of the concealment. If a person, having concealed himself before process issues, continues to do so after it has issued, he absconds." (1881) 4 Mad. 393, 397.

'In order to avoid' : "The absconding must be with a purpose. This...implies that the absconder knows, or at least has reason to believe, that the process has issued. He may...abscond to avoid the issue of process, and this would not be an offence punishable under Section 172. When he knows, or has reason to believe, that it has issued, he may be

unwilling to show contempt of the authority of the Court or Officer who has issued it, and may comply with it or so conduct himself that service may be effected; but he can hardly be said to be guilty of contempt of authority if he does not know and has not reason to believe the authority has been exercised, nor to be absconding to prevent the service of a process, if he does not know, nor has reason to believe, that it has issued." (1881) 4 Mad. 393, 397-98.

Summons, notice or order : For the service of 'summons', See Sections 69-74, Criminal Procedure Code. A warrant addressed to a police-officer is not a 'summons, notice or order'; (1905) 2 C L J 625; nor warrant addressed to a Nazir by a Civil Court for the arrest of a defendant in execution of a decree. (1890) P.R. No. 28 of 1890. Because from the wording of the section it appears that 'the summons, notice or order', therein referred to should be addressed to the same person whose attendance is required and who absconds to avoid being served with such 'summons, notice or order'. A warrant is not an order served on an accused, is simply an order to the police to arrest him. (1881) Unrep. Cr. C. 152. This section does not cover the absconding from a warrant of arrest. (1928) 50 All. 666. But this section is held applicable to a witness who absconds to evade the service of a warrant issued by a Magistrate under Sections 181 to 196 of the Criminal Procedure Code. (1868) 9 W R 70 (Cr.).

173. Preventing service of summons or other proceeding, or preventing publication thereof : Whoever in any manner intentionally prevents the serving on himself, or on other person, of any summons, notice or order proceeding from any public servant legally competent as such public servant, to issue such summons, notice or order,

or intentionally prevents the lawful affixing to any place of any such summons, notice or order,

or intentionally removes any such summons, notice or order, from any place to which it is lawfully affixed,

or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Scope : There are four offences under this section :

- (1) The prevention of service of summons, notice or order.
- (2) The prevention of the lawful affixing, to any place, of such summon, notice or order.
- (3) The removing of such summons, etc., after it has been fixed.
- (4) The prevention of the lawful making of any proclamation.

Provisions of Order V, rule 17, C.P.C. are highly technical and penal in nature and should be construed strictly. If there is intentional prevention of service case may well fall within ambit of Section 173, P.P.C. P L D 1968 Lah. 639 at p. 648.

According to the case of *Hameed Ullah Khan v. State*, 1997 M L D 1745. Trial Court need not record some evidence for summoning an accused person whose name appears in column No. 2 of the Challan.

174. Non-attendance in obedience to an order from public servant : Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same,

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the proclamation be under Section 87 of the Code of Criminal Procedure, 1898, with imprisonment which may extend to three years, or with fine, or with both.

Illustrations

(a) A, being legally bound to appear before the High Court of ¹[Sind] in obedience to a subpoena issuing from that Court, intentionally omits to appear. A has committed the offence defined in this section.

(b) A, being legally bound to appear before a Zila Judge as a witness, in obedience to a summons issued by that Zila Judge, intentionally omits to appear. A has committed the offence defined in this section.

COMMENTS

Scope : The offence contemplated by this section is an omission to appear at a particular time and at a particular place before a specified public functionary in obedience to a summons, notice or order, or proclamation not defective in form.

Ingredients : The section requires three essentials **P L D 1968 Lah. 639—**

1. That a summons, notice, order, or proclamation for attendance must be issued by a public servant who was legally competent to issue the same.
2. That the person summoned must be legally bound to attend at a certain place and time in obedience to the summons, notice, order or proclamation proceeding from the public servant.
3. That the person summoned must have (a) intentionally omitted to attend at that place or time, or (b) departed from the place where he was bound attend before the time at which it was lawful for him to depart.

Summons of Magistrate served on a Senior Advocate of Supreme Court on 8th December, 1967 to appear before him as prosecution witness on 9th December, 1967.

1. Subs. by the Federal Laws (Revision & Declaration) Ordinance, XXVII of 1981.

Advocate had professional engagements on date sending his clerk for adjustment of programme for appearance before the Magistrate. Magistrate draw up complaint under Section 174 against Advocate without finding out whether his omission to attend was wilful or not. No such complaint was drawn against other witnesses who had failed to attend despite service. Order of Magistrate, was not only uncalled for but also *mala fide*. 1968 P Cr. L J 755.

175. Omission to produce document to public servant by person legally bound to produce it : Whoever, being legally bound to produce or deliver up any document to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustration

A, being legally bound to produce a document before a Zila Court, intentionally omits to produce the same. A has committed the offence defined in this section.

COMMENTS

An intentional omission to produce or deliver up a document to a public servant, is an offence under this section. It must be established, however, that the offender was legally bound to produce the document in question. Thus a Court or officer-in-charge of a Police Station may issue a summons or written order to any person, including the accused, to produce any document desirable for the purpose of trial or investigation. So an intentional failure to comply with such an order would be an offence under this section. But there is no law which compels an accused person undergoing his trial to produce a document criminating himself and his refusal would not, therefore, be within this section.

176. Omission to give notice or information to public servant by person legally bound to give it : Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both;

or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both;

or, if the notice or information required to be given is required by an order passed under sub-section (1) of Section 565 of the Code of Criminal Procedure, 1898 (V of 1898) with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Scope : This section applies to persons upon whom an obligation is imposed by law to furnish certain information to public servants and the penalty which the law provides is

intended to apply to parties who commit an intentional breach of such obligation, **P L D 1962 Kar. 873**, and not where the public servants have already obtained the information from other sources. **(1933) 34 P L R 712**.

When once the information of the fact of the crime has reached the police, the object of the section has been fulfilled and no further duty imposed by it remains. **(1983) Unrep. Cr.C. 674**. The fact that some persons bound to give information have given that information while other persons who might be bound to give information have omitted to do so is no ground for their prosecution under this section. **A R 1925 Nag. 217**.

Ingredients : This section requires :

1. That a person must be legally bound to give any notice or to furnish information on any subject to a public servant.
2. That he has intentionally omitted to give such notice or information in the manner and at the time required by law.

Section 176 is not to be used for the purpose of vexation but to secure due information to public servant or Police of offence committed in their jurisdiction. Where Police or public servant were already in possession of required information obtained from some other source, Section 175 is not to be applied to such case. **P L D 1977 B J 23**.

177. Furnishing false information : Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;

or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the district that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this section.

(b) A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the house of Z a wealthy merchant residing in a neighbouring place, and being bound, under Clause 5, Section VII, Regulation III, 1821, of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest police station, wilfully misinforms the police officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distinct place in a different direction. Here A is guilty of the offence defined in the latter part of this section.

Explanation : In Section 176 and in this section the word "offence" includes any act committed at any place out of Pakistan, which, if committed in Pakistan, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and the word "offender" includes any person who is alleged to have been guilty of any such act.

COMMENTS

Scope : This section contains two branches. The first branch--"Whoever being legally bound...or with both"--deals with the simple case of a person who, being legally bound to

furnish true information to a public servant, furnishes false information to him. It, therefore, does not apply to any falsehood told to a public servant, but to such statements only as he is 'legally bound' (S. 43) to make. (1891) 14 Mad. 484. Under the second branch--'or if information....or with both'--the information which a person is legally bound to give 'for the purpose of preventing the commission of an offence' relates not to commission of offences generally, but to the commission of some particular offence. (1887) 15 Cal. 386. The section does not apply to the case of any person who is examined by a police-officer making a false statement, but to cases where, by law, land-holders or village-watchmen are bound to give information, and to other analogous cases of the same description. (1969) 12 W R 23 (Cr.).

Ingredients : This section requires:

1. That a person must be legally bound to furnish information on a particular subject to a public servant.
2. That he must furnish, as true, information on that subject which knows or has reason to believe to be false.

178. Refusing oath or affirmation when duly required by public servant to make it : Whoever refuses to bind himself by an oath or affirmation to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

179. Refusing to answer public servant authorised to question : Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Scope : This section deals with refusal to answer a question put by public servant in the exercise of his legal powers. Where a witness said that he did not know the name of his grandfather it was *held that* he did not commit an offence under this section. Similarly when the witness said that he did not know the results of a particular case it was *held that* he did not intentionally refuse to answer the question.

180. Refusing to sign statement : Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENTS

'Statement' : The statement must be such a one as the accused can be legally required to sign. (See Ss 154, 164, 200, 364 of Cr.P.C.). An accused person who refuses to sign a statement made at his trial in answer to questions put by the Court, commits no offence under this section. But, if the accused refuses to sign his statement recorded under Section 364 of the Code of Criminal Procedure, he commits it. P L D 1967 Kar. 75.

'Deposition' : A witness is not legally bound to sign his deposition in a Revenue Inquiry, (1871) 1 Weir 112, nor is he bound to sign or affix his thumbmark to his deposition in a civil case; P.R. No. 8 of 1912; consequently he cannot be convicted under this section for his

refusal to sign it. Where a witness is bound to sign his deposition, it is only after the evidence has been read over to him and he has admitted it to be correct and has refused to sign it, that he will be guilty under this section.

181. False statement on oath or affirmation to public servant or person authorised to administer an oath or affirmation : Whoever, being legally bound by an oath or affirmation to state the truth on any subject to any public servant or other person authorized by law to administer such oath or affirmation, makes, to such public servant or other person as aforesaid, touching that subject any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENTS

Scope : The section applies only where the public servant or other person is "authorized by law to administer an oath"; it does not apply where the public servant administers the oath in a case wholly beyond his jurisdiction and also where he is not competent to take a statement on solemn affirmation.

Perjury : Rent Controller refusing to file complaint against perjurer on ground that he was not a "Court" in technical sense but only a Tribunal of special jurisdiction. The Assuming Rent Controller not to be a Court and not competent to file complaint in accordance with provisions of Section 195 (b) of Cr.P.C. yet he was a public servant and offence under Section 181 being disclosed case covered by Section 195 (i)(a), Cr.P.C. and no Court could take cognizance of any offence committed before such public servant except on his own complaint. 1972 P Cr. L J 306.

182. False information with intent to cause public servant to use his lawful power to the injury of another person : Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant--

- (a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or
- (b) to use the lawful power of such public servant to the injury or annoyance of any person,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Illustrations

(a) A informs a Magistrate that Z, a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(b) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

(c) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of their information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.

COMMENTS

Scope : This section relates only to cases of information given to an official with the intention of causing, or with knowledge that it is likely to cause, such official to do, or omit to do, something which he ought to do, or omit to do, or to use his lawful power to the injury or annoyance of any person. This is a distinct offence from the one described in Section 211 which relates to an attempt to put the Criminal Courts in motion against another person.

The fact that the public servant did not in fact do, or omit to do, anything, or did not use the lawful power in consequence is not a deciding factor. The offence is complete when the false information has been given knowingly with one or the other intentions specified in the section.

A person who makes a false statement in a departmental inquiry comes within the purview of this section notwithstanding that it was made in answer to questions. **A I R 1920 Lah. 410.**

Even if the truth or falsity of the information given to the police is not judicially determined before the informant is called upon to answer the charge of giving false information, he is at least entitled to a show-cause notice before a complaint under Section 182, P.P.C. is filed against him. **1977 P Cr. L J 289.**

Deputy Commissioner had taken action and judiciously investigated the matter on the complaint filed by the accused before the Commissioner which was found to be false. Commissioner, therefore, should not have necessarily filed the complaint under Section 182, P.P.C. against the accused. Proceedings under Section 182, P.P.C. taken against the accused on the complaint of the Deputy Commissioner, *held*, were legally valid without any infringement of the provisions of Section 195(1)(a), Cr.P.C. **1994 S C M R 1280.**

Police after investigation of case registered on complaint of petitioner finding it false and submitting complaint against petitioner under Section 182, P.P.C. Petitioner, however, feeling aggrieved filing direct complaint in Court against respondent and Court also issuing process against respondent. Contention that no action could be taken against petitioner under Section 182, P.P.C. because trial of accused respondent on basis of direct complaint was still pending was held to be correct. Proceedings under Section 182, P.P.C. were stayed still decision of complaint case against respondent. **1974 P Cr. L J 289 Note 114 at p. 73.**

Neither the charges brought by the petitioner were judicially tried nor was she giving an opportunity to show cause why she should not be proceeded against under Section 182, P.P.C. Further, from the complaint filed by the police in the trial Court, it was evident that only two persons, namely, S.I. Incharge P.S. and City Inspector, had been cited as witnesses against the petitioner. The record showed that these police officers had no first hand information about the incident, reported to the police by the petitioner, which resulted in the fracture of her wrist-bone nor of any other facts alleged by the petitioner previously. The complaint was based merely on their opinion which, in turn, was based upon the statements of certain persons examined by the police. It was, therefore, clear that the witnesses, cited in the complaint, were not in a position to prove legally anything against the petitioner. **1974 P Cr. L J Note 114 at p. 73.**

The Superintendent of Police made complaint which was found false and it was declared that officer or any other officer to whom he was subordinate was competent to initiate proceedings under Section 192, P.P.C. and the complaint initiated by S.H.O. was wholly incompetent because provisions of Section 195, Criminal Procedure Code are mandatory in nature and non-compliance thereof bars jurisdiction of the Court, the contention was upheld. **1977 P Cr. L J 445.**

Conviction under both Sections 182 and 211, P.P.C. not possible : Provisions of Sections 182, P.P.C. & 211, P.P.C. being similar in nature, accused cannot be convicted for both the offences simultaneously. **1997 M L D 1182.**

Quashing of proceedings : According to case of *Muhammad Akram v. State*, contentions were that the report submitted by police under Section 173, Cr.P.C. was ill-founded, that the order of the Magistrate passed on the basis of said report was without any valid reasons and that the proceedings initiated against the accused under Section 182, P.P.C. were illegal and without jurisdiction and the same were sought to be quashed. It was *held that* inherent powers of High Court under Section 561-A, Cr.P.C. did not extend to uncalled for and unwarranted interference with the procedure provided under the law which must always be followed. Petition for quashing of proceedings being without merit was dismissed. **1997 M L D 1569.**

Proceedings initiated against the petitioners under Section 182, P.P.C. were the direct result of the cancellation of the F.I.R. which had been declared illegal and there being no basis for the said proceedings, superstructure on it could not be sustained. Proceedings pending in the Court of Magistrate against the petitioners under Section 182, P.P.C. were consequently declared to be without lawful authority and of no legal effect. **1997 P Cr. L J 634.**

Station House Officer of police station after having found the F.I.R. lodged by the petitioner as false straightaway submitted a report before the Magistrate for taking action against him under Section 182/211, P.P.C. without having obtained approval of the Magistrate under Section 173, Cr.P.C. which had been returned to S.H.O. for the said reason. Station House Officer of police station, thereafter, submitted fresh report before the Judicial Magistrate against the petitioner without the aforesaid approval and without disclosing the abovementioned facts, on which bailable warrants had been issued against him. Report could not be submitted by the S.H.O. without approval of the Magistrate under Section 173, Cr.P.C. and no proceedings could be initiated against the petitioner in such manner. Proceedings pending against the petitioner in the Court of Judicial Magistrate were quashed in circumstances. **1998 PCr.LJ. 1661.**

183. Resistance to the taking of property by the lawful authority of a public servant : Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Scope : A mere objection to the seizure of certain articles does not amount to resistance. Some overt act is necessary to indicate the intention of the accused. Thus where a person not only refused to give up the property but threatened to do harm to the police officer if he ventured to carry out the warrant, it was *held that* he committed an offence under this section, since the threat was an overt act sufficient in law to constitute 'voluntary obstruction'.

Offers resistance : Resistance involves an active physical obstruction. A mere passive refusal or even a threat of physical obstruction is not resistance.

This section punishes for offering resistance to the taking of property by public servant having lawful authority in that behalf.

Lawful authority : Unless it is clearly established that the person seizing the property had lawful authority to do so there can be no conviction under this section. Lawful Authority means authority given by law, where a village watchman without the requisite written authority attached some property for levying the amount of arrears and resistance was offered to such attachment, and where a bailiff distrained some sheep and goats not belonging to the judgment-debtor but belonging to the person who resisted the distraint and who had a *bona fide* claim of right, the person resisting was not held guilty of an offence under this section.

184. Obstructing sale of property offered for sale by authority of public servant : Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

COMMENTS

Scope : This section punishes intentional obstruction to the sale of any property conducted under the lawful authority of a public servant. Notices given at public sales by persons having, or claiming, in good faith to have an interest in the property, will not be deemed as obstruction. But it will be otherwise if they are not given *bona fide* and merely for the purpose of injuring the sale.

185. Illegal purchase or bid for property offered for sale by authority of public servant : Whoever, at any sale of property held by the lawful authority of a public servant, as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

186. Obstructing public servant in discharge of public functions : Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENTS

Scope : This section deals with the general offence of obstructing a public servant in the discharge of his functions but does not deal with obstruction of any public servant or of any person. It deals with the obstruction of a proceeding conducted by a public servant.

Ingredients : This section requires two essentials--

1. Voluntary obstruction to a public servant.
2. Such obstruction must be in the discharge of public functions of such public servant.

The section does not contemplate constructive obstruction to a judicial officer in the discharge of his judicial functions even when they are of a *quasi-executive* character or when the proceedings before him are in execution.

The word 'obstruction' means actual obstruction, i.e., actual resistance or obstacle put in the way of a public servant. The word implies the use of criminal force and mere threats or threatening language or mere abuse is not sufficient.

A person standing in staircase verbally objecting to a police search party going upstairs without any threat or obstruction of the passage, a person spreading a false report and thereby preventing persons from bringing their children for vaccination and a person refusing to serve on a village Panchayat as it included a member of the depressed classes and dissuading other people from serving on it, were held to have committed no offence under this section.

F.I.R. registered against the petitioners was the outcome of *mala fide* and ulterior design of the complainant who got the same registered as a counterblast under apprehension of

same complaint being filed by the other side. Facts narrated in the F.I.R. neither attracted the provisions of Section 186/353, P.P.C. nor disclosed the commission of a cognizable offence. Law did not permit to jeopardise the liberty of any individual and subject him to all kinds of harassment and humiliation by way of meaningless criminal prosecution. F.I.R. registered against the petitioners was quashed in circumstances. **1995 M L D 1140.**

187. Omission to assist public servant when bound by law to give assistance : Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both;

and if such assistance be demanded of him by public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

COMMENTS

Scope : This section provides, *first*, in general terms, for the punishment when a person being bound by law to render assistance to a public servant in the execution of his public duty intentionally omits to assist; *secondly*, it provides for the punishment when the assistance is demanded for purposes as such

- (1) executing any process lawfully issued by a Court of Justice;
- (2) preventing a commission of an offence;
- (3) suppressing a riot, or affray, or of apprehending a person charged with or guilty of an offence or of having escaped from lawful custody.

Persons bound to furnish information to public servants are punished under Sections 176 and 177. Persons bound to assist public servants come within the purview of this section. In all these cases a breach of legal obligation on part of the accused is necessary. For instance, if a person required to attend a search fails to do so without reasonable excuse, he will be guilty under this section.

The word 'assistance' as used here implies that the party who assists in doing something which in ordinary circumstances, the party assisted can do for himself. The assistance which a private person is bound to render to a public servant in the execution of his duty, must be something definite and specific. Refusal to attend and witness a search when called upon to do so in writing, under Section 103 of the Criminal Procedure Code, is an offence under this section. But refusal to sign the search list by a witness who attends the search is not an offence under this section, as it is not made penal under it.

Similarly where the accused refused to assist a police constable, who wished to bury the dead body of a man who had died of cholera leaving no relations, and threatened to punish any one who did so, it was *held that* because they were not bound to assist the constable in such a case they were not liable.

188. Disobedience to order duly promulgated by public servant : Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction,

shall, if such disobedience causes or tends to cause obstruction, annoyance or injury or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation : It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce harm.

Illustration

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in the section.

COMMENTS

Scope : This section includes in its ambit the orders passed under Section 144 and Section 145, Criminal Procedure Code. The first kind of orders would be passed by the executive authorities and the second kind would be passed by judicial officers. It cannot be contended that while the breach of an executive order is punishable under Section 188 of the Penal Code, the breach of a judicial order is not so punishable. The test is whether the order is for the purpose of maintaining public tranquillity, health, safety or convenience or not. If the order fulfils this requirement, its breach would be punishable under Section 188. Orders passed in judicial proceedings are normally not governed by Section 188. An order under Section 145, Criminal Procedure Code, is however amongst the exceptions. It is passed in the interest of maintaining public peace and, therefore, its breach is punishable under Section 188. **P L D 1967 Pesh. 310.**

Ingredients : The section requires--

- (1) that there must be an order promulgated by a public servant;
- (2) that the public servant must have been lawfully empowered to promulgate such order;
- (3) that a person having knowledge of such order and directed by such order--
 - (a) to abstain from a certain act, or
 - (b) to take certain order with certain property in his possession or under his management, has disobeyed such direction.
- (4) that such disobedience causes or tends to cause--
 - (i) obstruction, annoyance, or injury, or risk of it, to any person lawfully employed, or
 - (ii) danger to human life, health or safety, or
 - (iii) a riot or affray. **A I R 1940 Pat. 446.**

Promulgation of order : Order duly made and promulgated, although not strictly in accordance with law, and brought to the actual knowledge of the person sought to be affected by it is sufficient to bring the case under this section. Private information will not be

"promulgation". Law does not, however, prescribe any particular mode in which an order is made known openly and publicly.

It is necessary that the order should be in writing and duly promulgated and directed to the accused. But a general order also is quite sufficient. This section applies to orders passed under Section 144, Cr.P.C. and disobedience of an order passed under that section is punishable under this section. **1969 P Cr. L J 543.**

The petitioner delivered a speech in the mosque on the loudspeaker. When questioned he stated that he made a religious speech in the light of Qur'an and Sunnah. He was prosecuted for violating the order of Magistrate prohibiting the use of loudspeaker. On inquiry it was found that the order of the Magistrate prohibiting the use of loudspeaker had not been placed on the record. It was *held that* since the prosecution failed to produce the order of the Magistrate to the effect that the use of loudspeaker in the mosque was banned, no offence could have committed. In the circumstances no proper promulgation was made. **1981 P Cr. L J 757.**

Cognizance by Court : Section 188, P.P.C. having been made cognizable by an amendment made in the Schedule of Criminal Procedure Code, a police officer can now arrest a person without warrant of an offence punishable thereunder has been committed in any public place, but there being no corresponding amendment in S. 195, Cr.P.C. a Court despite that can only take cognizance of such an offence on a complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate. **PLD 1996 Pesh. 37 (a).**

Quashing of proceedings : Complaint against the accused was not made in writing by the public servant concerned as required under Section 195(1)(a), Cr.P.C. whose order had been violated. Magistrate was not competent to take cognizance of the offence under Section 188, P.P.C. on police report. Proceedings pending against accused before the Magistrate were quashed in circumstances. **1995 M L D 1803.**

Although the offence under Section 188, P.P.C. had been made cognizable by making an amendment in the Schedule attached to the Code of Criminal Procedure, yet the corresponding amendment in Section 195, Cr.P.C. was still wanting. Cognizance of the offence under Section 188, P.P.C., therefore, could not be taken on the F.I.R. when no complaint had been filed by the Competent Authority as envisaged by Section 195(1)(a), Cr.P.C. Taking of cognizance by the Magistrate in the case being illegal, proceedings against the accused before him amounted to the abuse of the process of the Court and the same were quashed accordingly. **1998 P Cr. L J 93.**

Police Officer was not authorised to register F.I.R. for the violation of Section 144, Cr.P.C. unless complaint in writing was made by the authority in terms of Section 195(1)(a), Cr.P.C. Proceedings pending against accused in the Court of Magistrate in pursuance of said F.I.R. being invalid and illegal were quashed. **1998 P Cr. L J 87.**

189. Threat of injury to public servant : Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Mere empty threats, unattended with any formal intention of wrong, should be distinguished from threats really calculated to cause the persons to whom they are held out to be in fear of the injury threatened. Where person arrested in execution of a decree refused to follow the peon who arrested him, and threatened to use violence, it was *held that* he was guilty of an offence under this section. **A I R 1955 Pat. 183.**

'Injury, what is' : "Injury" means, such as cannot be caused according to law, an illegal harm. Thus the mere threat to bring a legal complaint either before a Court or before a public servant's superior is no "injury". A Police Constable stopped a motor-car travelling at night without lights. During an altercation which took place between the driver and the constable the accused came up and told the driver to bring a complaint against the constable, in which he himself would be pleased to give evidence on behalf of the driver. It was *held that* the accused was guilty of an offence under this section. **P L D 1952 Bal. 19.**

It is essential that when threats are offered to Government servants some specific injury, whether implied or direct, must present in the words of the threat offered. For instance, if a person threatens that he will beat a Government servant unless he will or will not do some act; or that he will lodge a false case against him or implicate him in some criminal proceedings falsely, such threats would undoubtedly be threats of injury which might influence the Government servant concerned through fear to act in the manner required by the person who threatened him. But the words "I will see about you" cannot possibly be considered as indicating a specific threat of injury. Moreover, this type of threat is one which is of very common application indeed and is nothing more than a means of giving vent to a person's immediate feelings without carrying with it any intention of a specific threat of injury. It is apparent that the object underlying Section 189, P.P.C. is to protect a Government servant from a real fear of injury though whether that injury is or is not caused is immaterial. Unless the Government servant is in fear that some specific injury is likely to be caused to him, it would normally be improper to convict a member of the public of an offence under this section. **A I R 1925 Lah. 658.**

190. Threat of injury to induce person to refrain from applying for protection to public servant : Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any public servant legally empowered as such to give such protection, or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENTS

Scope : This section provides for the punishment of a person holding out a threat of injury to and person to prevent him seeking protection from a police servant empowered as such to give him protection.

'Injury' : A threat of institution of a civil suit for a mere declaration of right against any person who was objecting to that right was held to be not harm illegally caused to that person in body, mind, reputation or property. **A I R 1926 All. 277.**

CHAPTER XI

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE

The Code treats the giving and the fabricating of false evidence in exactly the same way, and marks the grades of those offences on the principle that the law ought to make a distinction between the kind of false evidence which produces great evils and the kind of false evidence which produces comparatively slight evils. As plaints and written statements are verified by the civil suitors who present them, the Code renders punishable the deliberate assertion of falsehood in pleadings.

191. Giving false evidence : Whoever being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, which he either knows or believes to be false or does not believe to be true, is said to give false evidence.'

Explanation 1 : A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2 : A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

Illustrations

(a) A, in support of a just claim which B has against Z for one thousand rupees, falsely swear on a trial that he heard Z admit the justice of B's claim. A has given false evidence.

(b) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(c) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is merely as to his belief, and is true as to his belief, and therefore, although the signature may not be handwriting of Z, A has not given false evidence.

(d) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject, A gives false evidence whether Z was at that place on the day named or not.

(e) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement, which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. A has given false evidence.

COMMENTS

Scope : The words of this section are very general, and do not contain any limitation that the false statement or document, made shall have any bearing upon the matter-in-issue. It is sufficient if the false evidence is intentionally given, that is to say, if the person making the statement makes it advisedly, knowing it to be false, and with the intention of deceiving the Court, and of letting it to be supposed that which he states is true.

Ingredients : The offence under this section involves three ingredients:

- (1) A person must be legally bound (a) by an oath, or any express provision of law, to state the truth, or (b) to make a declaration upon any subject;

- (2) He must mark a false statement; and
- (3) He must know or believe it to be false, or must not believe it to be true.

Legally bound by an oath : A person is legally bound to state the truth when the omission to do so is illegal. An oath or solemn affirmation is not a *sine qua non* to the offence of giving false evidence. The offence may be committed although the person giving evidence has neither been sworn nor affirmed. If the Court has no authority to administer an oath to a witness the proceeding will be *coram non judice* and a prosecution for false evidence will not stand.

Want of jurisdiction to administer oath : If the Court administering the oath is acting beyond its jurisdiction a conviction will be sustained.

It is not competent to a Court conducting an inquiry into the conduct of a vakil to take a statement from him on oath and the vakil making a false statement before the Court conducting the enquiry does not render himself liable under this section or even under Section 193 of the Penal Code.

'Makes any statement which is false' : It must be shown that the statement said to have been false, could not but be false. It is not sufficient to show that the probabilities are that the statement was false.

Direct proof of the falsity of the statement is essential. But, the law makes no distinction between the testimony of a witness directly falsifying such statement and the contradictory statement, of the person charged, although not made on oath. Such a statement when satisfactorily proved, is quite as good evidence in proof of the charge as the incriminatory statement of a provision charged with any other offence and on precisely the ground of admission of the accused person being inconsistent with his innocence.

The false evidence must be intentionally false to the knowledge or belief of the person giving it. Intention is an essential ingredient in the constitution of the offence. The matter sworn to must be either false in fact, or, if true, the accused must not have known it to be so.

192. Fabricating false evidence : Whoever causes any circumstance to exist or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."

Illustrations

(a) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated.

(b) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(c) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting, purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the Police are likely to search. A has fabricated false evidence.

COMMENTS

The wording of this section is so general as to cover any species of crime which consists in the endeavour to injure another by supplying false data upon which to rest a judicial decision.

Ingredients : The offence defined in this section contains the following ingredients:

1. (a) Causing any circumstance to exist, or
 - (b) making any false entry in a book or record, or
 - (c) making a document containing a false statement.
2. That such circumstance, false entry, or false statement must have been intended to appear in evidence in--
 - (i) a judicial proceeding, or
 - (ii) a proceeding taken by law before a public servant or an arbitrator.
3. That such circumstance, false entry or false statement so appearing in evidence, might cause any person, who, in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion.
4. The formation of opinion should be touching any point material to the result of such proceeding.

Whoever : The word "whoever" would include an accused person. There is no provision giving him such immunity as regards use of fabricated evidence. **A I R 1922 Bom. 99.**

Judicial proceeding : Generally speaking a judicial proceeding is one in which statement is given on oath and the officer conducting the proceeding is authorised by law to administer it. The following have been held to be the tests and instances of judicial proceedings :--

- (1) Examination of complainant in reference to the matter of his complaint is an investigation directed by law, and therefore a stage of judicial proceeding.
- (2) An investigation under Chapter XIV of the Code of Criminal Procedure is a stage of judicial proceeding.
- (3) A step taken by the Court in the course of the administration of justice in connection with a pending case.
- (4) A preliminary inquiry by a Court under Section 476 of the Criminal Procedure Code is a judicial proceeding.
- (5) An inquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; or between him and the community generally; but even a Judge, acting without such an object is not acting judicially.
- (6) An inquiry by a Magistrate, before the issue of an order under the Criminal Procedure Code. Section 144 is a stage of a judicial proceeding.
- (7) An inquiry by police preliminary to a proceeding before a Court of Justice, is a judicial proceeding.

'That such circumstance.....may cause any person who in such proceeding is to form an opinion.....to entertain an erroneous opinion' : The false evidence must lead to the formation of an erroneous opinion. If a document does not lead to the forming of an erroneous opinion touching a particular point but leads rather to the forming of a correct opinion, then this offence is not committed.

An inquiry by a Magistrate with a view to tracing the writer of an anonymous letter addressed to him, charging certain persons with murder and without any reference to the truth

or otherwise of the charge of murder; an inquiry by a Magistrate to discover the writer of a scandalous petition; and a reference to a District Judge by the Telegraph Authorities of a letter for verification, were held to be not judicial proceedings.

The accused owed money to the complainant and sent a registered and insured packet purporting to contain currency notes in settlement of the debt. The packet contained waste paper. The complainant sued the accused for the debt, and the accused filed an application in the Court of the Subordinate Judge to receive the complainant's signed acknowledgment of the receipt of the packet as collateral evidence in proof of satisfaction. It was *held* that the only offence committed by the accused was an offence punishable under Section 193.

'Teaching any point material' : The evidence should be material to the case in which it is given. The word 'material' means of such a nature as to affect in any way, directly or indirectly, the probability of anything to be determined by the proceeding, or the credit of any witness, and a fact may be material although evidence of its existence was improperly admitted.

All false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect of such statements. Every question on cross-examination of a witness, which goes to his credit is material.

193. Punishment for false evidence : Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1 : A trial before a Court-martial is a judicial proceeding.

Explanation 2 : An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration

[Omitted by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981].

Explanation 3 : An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration

A, in an enquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding. A has given false evidence.

COMMENTS

Scope : This section prescribes the punishment for the two offences defined in the previous two sections. Paragraph 1 of the section provides higher punishment for giving false evidence, or for fabricating false evidence for the purpose of being used in any stage of a judicial proceeding and paragraph 2 provides higher punishment for giving false evidence or fabricating false evidence in any other case.

Accused had admittedly appeared himself as a genuine person in the Sessions Court and did not commit an act of impersonation. Report of the District Registration Office, relied upon by the Sessions Court, no doubt showed some tampering with the photograph affixed on the original National Identity Card of the accused which might be in contravention of the provisions of the National Registration Act, 1973, but cognizance of such offence could be taken by the Court only on the written complaint of the Registrar, General Registration. Accused, therefore, had *prima facie* not committed the offence under Sections 193 and 205, P.P.C. Show-cause notice issued to accused by Sessions Court and the cognizance of said offences taken by it being bad in law were set aside. **1996 P Cr. L J 1064.**

Intention : "Intention" forms the most essential ingredient of the offence of perjury under Section 193, P.P.C. For a conviction under Section 193, P.P.C. It is not enough that a certain statement, made by a witness should be false, but it also must be proved positively, that the false statement was made "Intentionally". A clear and distinct finding must be given, that the accused "intentionally" made a false statement. In the absence of such a finding, the conviction cannot be sustained. Where a formal prosecution police witness in a case under Section 302, P.P.C. had deposed before the committing Magistrate that he accompanied the investigating A.S.I. from the Police Post to the scene of occurrence and found "Mst. B lying dead in her house", and that he accompanied the dead body to the mortuary, whereas, at the trial in the Court of Session, in answer to the Public Prosecutor's questions, he said that they had found "Mst. B lying wounded in her house and she was able to speak", and the witness was prosecuted and convicted for perjury under Section 193, P.P.C. It was held that the error in the witness's statement in the committing Magistrate's Court was not intentional but proceeded from inadvertence, inasmuch as being more or less a formal witness. The Prosecuting Sub-Inspector, in the committing Magistrate's Court, did not particularly have in his mind the point whether Mst. B was alive or dead when the witness reached the spot with the A.S.I., but that, in the Court of Session, upon the defence taking up the position that the deceased had not made any dying declaration to the A.S.I. The Public Prosecutor pointedly asked the witness the questions to which the witness made the replies which were only apparently contradictory of his statement in the committing Magistrate's Court. The erroneous statement not being intentional, an offence under Section 193, P.P.C. had therefore not been made out. **P L D 1957 Pesh. 142.**

State of judicial proceeding : When a deposition by a witness contains a false statement, the deponent is guilty of perjury. The deposition is false notwithstanding its not being read over to the witness as required by Section 360, Criminal Procedure Code. A statement recorded by a Magistrate, in the course of a police investigation under Section 164 of the Criminal Procedure Code or in an inquiry into the conduct of a village headman against whom reports have been made, is not evidence in stage of a judicial proceeding within the meaning of this section.

Before parting with the case the Court considered it desirable to put on record its concern on the moral depravity of some of the public servants who for reasons best known to them transgress limits of impartiality and integrity by taking sides and become a cause of injustice to the public whose servants they claim to be and observed that harm could be greater to the welfare and tranquility of the citizens than to take away their confidence in the law enforcing agencies of the State. This lack of confidence which makes them shy to come forward before such agencies to help in prevention of crime ultimately results in miscarriage of justice. As the Courts finding on the quality of the evidence of a prosecution witness an Assistant Sub-Inspector of Police and the Investigating Officer in the case reflected on his untruthfulness, it was observed that it would be in his interest as well as in the interest of justice and the public at large, if a thorough probe is carried out by due judicial process into his conduct in order to ascertain whether he has perjured himself before the trial Court and thus

gone out of his way in the discharge of his duty. The Court therefore directed the Additional Sessions Judge to take up proceedings under Section 193 of the Pakistan Penal Code against the said witness and, if found guilty of the offence, to punish him suitably. It was further observed that nothing in this judgment shall affect the decision of the case against him which will be decided strictly on law and evidence available therein. **P L D 1982 F S C 21.**

Complainant after making complaint against petitioner and moving machinery of law against him *prima facie* perjuring himself at trial in order to help accused petitioner and brazenly denying his statements made before Police Inspector and Magistrate. Fact of such persons being hardly even proceeded against for perjury giving rise to impression in general public that any one can make a false statement in a Court of law with impunity. Such feeling not only not justified but in effect, *held*, undermines public confidence in judicial process. The case was one fit case for consideration by trial Court of propriety of prosecuting complainant for perjury. **P L D 1982 S C 291.**

Trial having already started, the proceedings were not quashed observing that notice under Section 476, Criminal Procedure Code was, not a necessary requirement in every case. **1981 P Cr. L J 55.**

Nature of proof : In order to convict a person under Section 193 of the Pakistan Penal Code, the prosecution must not only prove that he fabricated false evidence but it must also prove that in fabricating those documents he intended that the document may be used in any stage of a judicial proceeding. The fact merely that at some distant time it might be necessary that a document might be used to support any claim of title, does not prove the intent required under Section 193, Pakistan Penal Code. **P L D 1958 Dacca 341.**

False statement made before Magistrate : Lady accused had been convicted by the Trial Court on her admission of having made a false statement before the Magistrate implicating co-accused for abduction, Zina-bil-Jabr and coercive Nikah. Said statement was urged to have been made by the accused due to fear of her parents and of police. Ladies under harassment of police and of their parents are compelled to give such statement so as to build the prosecution case. Justice is to be done and provisions of the penal section are to be invoked in keeping with the norms of the society. Accused was acquitted in circumstances. **1996 P Cr. L J 286.**

Offence of fabrication false evidence when complete : The offence of fabricating false evidence under Section 193, Penal Code is complete as soon as the fabrication is made if the evidence fabricated is intended to be used in any stage of a judicial proceeding. It is immaterial that the judicial proceeding has not been commenced, or that no actual use has been made of the evidence fabricated. **P L D 1960 Dacca 19.**

Complaint : Where offences under Sections 193, 468 and 471, P.P.C. appear to be committed in proceedings in Civil Court, the Magistrate cannot take cognizance of a case in respect of such offences except upon a complaint made by Civil Court. Cognizance of case against accused taken upon police challan and not upon complainant from Civil Court, proceedings were quashed. **P L D 1978 Lah. 307.**

Conviction : On the F.I.R. registered under Sections 302/324/148/149, P.P.C at the instance of accused usual police investigation was carried out culminating in the submission of complete challan in the Court. While being examined on oath in Trial Court accused denied to have lodged the said report and resiled from his earlier statement. Accused had admittedly perjured himself and deserved no leniency. Person who had deliberately told a lie during the solemn proceedings in a Court of law knowing fully well that he was thereby likely to ruin the life or reputation of a innocent citizen or jeopardise his liberty by falsely involving him in a criminal case, did not deserve any leniency and ought never be let off lightly. Conviction and sentence of accused were upheld in circumstances. **1998 PCr. LJ 1630.**

194. Giving or fabricating false evidence with intent to procure conviction of capital offence : Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause any person to be convicted on an offence which is capital by any law for the time being in force, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

if innocent person be thereby convicted and executed : and if an innocent person be convicted and executed in consequence of such false evidence the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

COMMENTS

To constitute this offence the accused must give false evidence intending thereby to cause or knowing it to be likely that he will thereby cause some person to be convicted of a capital offence. Such statement even if made to a police-officer, will amount to the offence of giving false evidence, provided the Court can infer that it was the intention of the accused to stick to the false evidence right up to the trial of the case.

For making our *prima facie* case under Section 197, P.P.C. sufficient independent material before the Court is necessary. Bare statements of accused that they implicated person due to coercion by police is not enough. **P L D 1963 Kar. 624.**

195. Giving or fabricating false evidence with intent to procure conviction of offence punishable with imprisonment for life or for a term of seven years or upwards : Whoever gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause any person to be convicted of an offence which by any law for the time being in force is not capital, but punishable with imprisonment for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Illustration

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is imprisonment for life or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to such imprisonment for life or imprisonment with or without fine.

COMMENTS

Scope : This section makes it punishable to give or fabricate false evidence with the intention to cause or knowing it likely that he will thereby cause, any person to be convicted of an offence which though not capital yet is punishable with imprisonment of more than seven years. This section has been substituted for the old section so as to make punishable severely even such causes where the sentence may be severe due to false evidence of any person.

Provisions of this section do not apply to a person who is not party to the Proceedings. **P L D 1960 Dacca 813.**

Where perjury was committed, it was *held that* the Court is duty bound to lodge a complaint under Section 196, P.P.C. in the interest of justice against the offending person. **P L D 1981 S C (AJ&K) 3.** No bar for a private person for initiating inquiry under Section 476,

Criminal Procedure Code where perjury is committed. The Court should not be influenced and need not refuse to launch proceedings merely on the ground that an interested party, muchless an advocate has moved it for such an action. **P L D 1981 S C (AJ&K) 3.**

196. Using evidence known to be false : Whoever corruptly uses or attempts to use as true or genuine evidence, any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

COMMENTS

Scope : This section makes it an offence to use corruptly any evidence which the person using it knows to be false or fabricated. There must, therefore, be knowledge of its falsity and in addition the element of corruption.

It must be read with Sections 191 and 192, and can only apply to the use of evidence which was false evidence within the meaning of Section 191 or fabricated evidence within the definition laid down in Section 192. **A I R 1925 Rang. 191.**

Uses or attempts to sue : The word 'corruptly' is used to denote that those whose duty it is, not to judge of the credibility of evidence, but to submit it for the consideration of judicial and other functionaries, on behalf of their clients, do not incur the penalties for using false evidence.

The word "corruptly" means something different from "dishonestly" or "fraudulently." Although the user may not be dishonest or fraudulent, it may nevertheless be corrupt, if the user is designed to corrupt to prevent the course of justice. A person who files rent-receipts alleged to have been granted by one of the landlords, who actually signs the receipts to support a false case of a tenancy under the landlord, is guilty of corruptly using as true or genuine evidence which he knows to be false within the meaning of this section. **M & M 164.**

Corruptly : The word corruptly is not intended to connote a motive necessarily connected with the passing of money as an inducement to the person impugned to use or attempt to use the fabricated evidence. An intention to procure a false conviction in a corrupt intention. **A I R 1914 Lah. 433.**

It was *held* that the petitioner's prosecution was uncalled for, improper and illegal where the petitioner was neither a party in application for setting aside *ex parte* decree nor was alleged that the petitioner gave fabricated false evidence nor any evidence was led to show the abetment of co-defendants. **1977 P Cr. L J 284.**

197. Issuing or signing false certificate : Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

COMMENTS

Several laws require a certificate of some matter to be given. The offence certifying in any of these, knowing or believing that the certificate is false, is put on the same footing as the offence of giving false evidence. In order to constitute an offence under this section the certificate must relate to any fact of which such certificate is by law admissible in evidence.

The certificate must, however, be false in a material point. The issuing or signing it must be by the officer or person authorized to certify.

Ingredients : This section has two essentials--

1. Issuing or signing of a certificate--
 - (a) required by law to be given or signed, or
 - (b) relating to a fact of which such certificate is by law admissible in evidence.
2. Such certificate must have been issued or signed knowing or believing that it is false in any material point.

Issues or signs any certificate required by law to be given or signed : The word "issues" means something different from using. It is the putting forth for the purpose of being used, and is preliminary to it.

A person giving a certificate which is not required by law to be given or signed cannot be convicted under this section although he may be convicted for giving false information to a public servant. **Pat. Unrep. Cas. 182.** But a copyist preparing an incorrect copy of a document and thereby enabling the applicant of the copy to use it in a suit would be liable to be convicted under this section. **15 P R 1879 (Cr.).**

Contempt of Court : Medical Certificate undisputedly was not issued by the accused (appellants) for the purpose of being produced before the Court for the grant of bail to the accused in the murder case and they as such had not interfered with the administration or the dispensing of the justice. Said certificate being of directory nature and having been supported by the Neuro-Surgeon could not be said to be false so as to fall within the mischief of Section 197, P.P.C. Accused, thus, had neither committed contempt of Court nor had produced false certificate before it. Proceedings initiated against the appellants by High Court under Section 3/4 of the Contempt of Court Act, 1976 and Section 197, P.P.C. were quashed accordingly. **1995 S C M R 1708.**

198. Using as true a certificate known to be false : Whoever corruptly uses or attempts to use any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

199. False statement made in declaration which is by law receivable as evidence : Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

COMMENTS

Object : This section is intended to make the penalty attached to the offence of giving false evidence applicable to declarations which, although not compellable, have, on being made, the same effect as the compulsory declarations referred to in Sections 51 and 191. It subjects any person who make a false declaration, which declaration may be used as evidence of the matters stated in it, to the penalties for perjury. Section 191 deals with compulsory declarations, this section with false declaration made voluntarily, provided such declarations are capable of being used as evidence.

Ingredients : This section requires three essentials--

1. Making of a declaration which a Court or a public servant is bound or authorized by law to receive in evidence.
2. Making of a false statement in such declaration knowing or believing it to be false.

3. Such false statement should be touching any point material to the object for which the declaration is made or used.

'Makes any statement which is false, and which he either knows or believes to be false' : There must be a deliberate false statement. Statements made in a reckless and haphazard manner, though untrue in fact, do not constitute any offence when the person making them immediately admits the mistake and corrects them. If an applicant makes reckless allegations against a Magistrate in his affidavit in the High Court for a transfer of criminal proceedings against him he lays himself open to a prosecution under this section. **A I R 1940 Pat. 631.**

'Bound or authorized by law to receive as evidence' : A declaration must be one which is admissible in evidence, and which the Court before which it is filed is bound or authorized by law to receive in evidence. It includes an affidavit in cases in which evidence may be given by affidavit. **A I R 1941 All. 635.**

Where a competent Court is approached by any private person alleging that order or judgment has been procured by giving false evidence and the perjurer be prosecuted. It is incumbent upon the Court to take note of it. In other case the counsel brought such a request to the Court for prosecution alleging that the Court has been misled by producing false evidence. The Court *held that* there is not legal bar placed against private person, muchless against advocates, to move Court for taking action under Section 476, Cr.P.C. Even it was also *held that* the Court can move *suo moto* in such circumstances and is duty bound to consider taking such action when such facts come to its notice and no good reason exists for not prosecuting the perjury. **P L D 1981 S C (AJ&K) 86.**

200. Using as true such declaration knowing it to be false : Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation : A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of Sections 199 and 200.

201. Causing disappearance of evidence of offence, or giving false information to screen offender : Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false;

if a capital offence : shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life : and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if punishable with less than ten years' imprisonment : and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longer term of the imprisonment provided for the offence, or with fine, or with both.

Illustration

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and also to fine.

COMMENTS

Object : This section relates to the disappearance of any evidence of the commission of an offence and includes also the giving of false information with the intention of screening an offender. Sections 202 and 203 relate to the giving or omitting to give such information, and Section 204, to the destruction of documentary evidence. There are three groups of sections in the Code relating to the giving of information. *Firstly*, Sections 118 to 120 deal with concealment of design to commit an offence; *secondly*, Sections 176, 177, 181, 182 deal with omission to give information and with giving of false information and, *thirdly*, Sections 201 to 203 deal with causing disappearance of evidence.

Principle : This section looks upon a person giving false information with intent to screen an offender as an accessory after the fact and makes him culpable as an offender committing an offence against public justice as the policy of the law is that even at the early stage of the enquiry nothing should be done which would lay false trials or cause the enquiry to be lurked or weaken the prosecution and injuriously interfere against public justice. **A I R 1959 Mad. 654.**

Confession--Evidentiary value : According to the case of *Mohammad Akram v. State*, 1997 P Cr. L J 441. conviction can be based on a confession if the same is voluntary and true.

"Knowing or having reason to believe" : It must be shown that the accused knew or had reason to believe that an offence had been committed. That he might have thought it very probable is not enough. **2 Cr. L J 133.**

The mere circumstance that the body of the deceased was recovered and disinterred at the instance of the accused, cannot lead to his conviction under this section. **P L D 1959 Lah. 50.**

Appreciation of evidence : Occurrence was unwitnessed and the prosecution case which rested on circumstantial evidence sounded like fiction rather than facts. Confession which was made basis of conviction had been totally denied by the accused and its truthfulness was open to serious doubts. Recoveries of weapons of offence, i.e., the knife and the hatchet were not only highly doubtful but also totally discrepant and did not corroborate the so-called confession. Accused were acquitted on benefit of doubt in circumstances. **1997 P Cr. L J 441.**

"Causes any evidence of the commission of that offence to disappear" : The expression 'any evidence of the commission of that offence' refers to evidence in its primary sense as meaning anything that is likely to make the crime evident such as the disposal of the murdered person's clothes or the existence of a wounded corpse, or blood-stains, fabricated documents or similar material objects indicating that an offence has been committed. **P L D 1960 S C 223.** The statements of a witness and *panchnamas* do not constitute such evidence.

Causing disappearance of evidence 'cannot be equated with keeping a witness away from Court or an agency competent to collect evidence. Word "evidence" used in Section 201

signifies concrete objects as distinct from witnesses who are not objects but animated beings. The word "evidence" as used in Section 201, P.P.C. is not capable of interpretation in a wide sense as the word is used in the provisions of Qanun-e-Shahadat Ordinance, 1984. This word is used in its primary sense as meaning a thing which by itself is evidence of the crime, e.g., the existence of wounds on a dead body or blood-stains or fabricated documents or weapon of offence, etc. **P L D 1979 Kar. 799.**

The question was whether a person found guilty of committing murder and causing disappearance of evidence of that murder could be convicted on both counts. Combination of convictions is not permissible, the conviction under Section 201, was set aside, in circumstances. **1977 P Cr. L J 1068.**

Dead body of the deceased had already been recovered much earlier than the arrest of the accused. Pointation by the accused of the place which was already known to Investigating Officer and from where the dead body had already been recovered was, therefore, of no help to the prosecution case. Accused was acquitted in circumstances. **1995 M L D 656.**

Where the murderer himself tries to screen the offence and removes the evidence of guilt, he cannot be convicted under Section 201, P.P.C. **1995 M L D 656.**

Causing disappearance of evidence : Expression "causing disappearance of evidence" in Section 201 cannot be equated with keeping a witness away from Court or any agency competent to collect evidence for purposes of trial. Evidence shut out by disappearance of witness does not amount to disappearance of evidence. Evidence signifies concrete objects distinct from witnesses who are not objects but animated beings. **1979 P Cr. L J Notes 156 at p. 100.**

202. Intentional omission to give information of offence by person bound to inform : Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENTS

Scope : This section punishes for omitting to give information, respecting an offence which one is legally bound to give. But the omission to give information must be an intentional one and the offence respecting which he is bound to give information, must have been known or believed to have been committed. The section is analogous to Section 176 which also punishes for intentional omissions of those who are legally bound to give information to the public servants.

Where a person assisted in burying the dead body knowing fully well that the corpse he is assisting to be buried is of a person who has been murdered, he was rightly convicted under Section 202, P.P.C. but where a person who did not believe or knew that an offence had been committed and assists the offender cannot be convicted under this section. Section 202, P.P.C. does not punish mere omission. The omission must be wilful, i.e., an omission which amounts to suppression of information due to some ulterior object. **P L D 1979 Kar. 799.**

Prohibition (Enforcement of Hadd) Order IV of 1979 : Offences under Art. 4 of the Prohibition (Enforcement of Hadd) Order, 1979 having been included in its Art. 3, accused could not be convicted under both the Articles and conviction and sentence of accused under Art. 4 of Prohibition (Enforcement of Hadd) Order, 1979 were consequently set aside. So far as conviction under Art. 3 of the said Order was concerned Trial Court had not clearly pointed out the specific term which could attract the act of accused to be treated as an offence. - Presumably Trial Court has either treated the accused as a transporter or as a carrier of heroin recovered from the truck in which he was travelling, but such presumption could not be upheld. Accused was neither the owner of the truck which contained the concealed heroin nor

was the owner of said heroin, but he had not denied his travelling along with the absconding accused at the time of recovery of about 40 k.gs. of heroin from the truck. Heroin recovered from the truck was exclusively in the control of owner/driver of the truck and the absconding accused could only be treated the transporter as well as the carrier of the heroin and not the accused who was his cleaner. Conviction and sentence of accused under Art. 3 of the Prohibition (Enforcement of Hadd) Order, 1979, therefore, were also set aside. However, accused had the knowledge of the heroin being transported and he was not travelling in the truck aimlessly. Accused was fully aware of the actual offenders and their role but he saved them by not giving true information particularly about the absconding accused with whom he was travelling. Accused in circumstances was convicted under Ss. 201 & 202, P.P.C. and sentenced thereunder accordingly. **1996 PCr. LJ 1856.**

203. Giving false information respecting an offence committed : Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation : In Sections 201 and 202 in this section the word "offence" includes any act committed at any place out of Pakistan, which, if committed in Pakistan, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460.

COMMENTS

Principle : A person who knowing that an offence has been committed volunteers information which he knows or believes to be false, obstructs justice and is therefore punished whether any intention to screen the offender can be proved against him or not, and whatever be the offence which the latter has committed.

Object : The object of the Legislature is not to insure general veracity or the making of correct statements in regard to supposed offences, or offences the commission of which might be falsely or incorrectly reported, but to discourage and punish the giving of false information to the police in regard to offences which were actually committed, and which the person charged knew, or had reason to believe, had been actually committed.

Statement to Police : This section does not apply to the case of a person who give false evidence as a witness to the police in the course of their investigation in reply to questions put to him. It only contemplates information volunteered by some person. Where the accused, while being examined by the police in answer to questions put to him, falsely stated that certain persons had committed theft and melted stolen property, it was *held* that he could not be convicted under this section.

204. Destruction of document to prevent its production as evidence : Whoever secretes or destroys any document which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant, as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.

COMMENTS

Scope : The section applies whether the proceeding is of a civil or criminal nature. Special and local laws requiring production of documents and containing penalties for destruction or obliteration of such documents are not affected by it.

'Secrets or destroys any document' : A person may secret a document not only when the existence of the document is unknown to other persons and for the purpose of preventing the existence of the document coming to the knowledge of anybody, but also when the existence of the document is known to others. But it is not necessarily enough to show that, upon an occasion on which it became his duty to produce the document, he failed to discharge that duty, though it may be a cogent piece of evidence. The fact that a man perjures himself by denying the existence of a document which, to his knowledge, is in his custody would be a still more cogent piece of evidence. (1930) 58 Cal. 1051.

Secreting document : Where the plaintiff in a suit referred to arbitration by consent, with a view to prevent a witness from referring to an endorsement on a bond, snatched up the bond which was lying beside the arbitrator, ran away, and refused to produce it, it was held that he had committed this offence. (1881) 3 Mad. 261.

'With the intention of preventing the same from being produced as evidence' : The act must have been done with the intention of preventing the document from being produced or used as evidence. Where a *patwari* was convicted under this section for destroying a leaf not of the Register of Mutation of a village which he might be lawfully compelled to produce in evidence, the conviction was set aside.

205. False personation for purpose of act or proceeding in suit or prosecution : Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.

COMMENTS

Scope : The offence punishable under this section is not merely cheating by using a fictitious name, but by falsely assuming to be some other real person and in that character making an admission, confessing judgment, or causing any process to be issued, etc.

The offence of false personation is dealt with in Sections 140, 170, 171, 171-D, 416 and this section. The offence is punishable under this section is that of false personation in order to--

- (a) make any admission or statement, or
- (b) confess judgment, or
- (c) cause any process to be issued, or
- (d) become bail or security, or
- (e) do any other act in any suit or criminal prosecution.

Falsely personates another : To constitute an offence of false personation it is not enough to show the assumption of a fictitious name. It must also appear that the assumed name was used as a means of falsely representing some other individual. 1 Weir 182.

Accused had admittedly appeared himself as a genuine person in the Sessions Court and did not commit an act of impersonation : According to the case of *Yousaf v. State*, report of the District Registration Office, relied upon by the Sessions Court, no doubt showed some tampering with the photograph affixed on the original National Identity Card of

the accused which might be in contravention of the provisions of the National Registration Act, 1973, but cognizance of such offence could be taken by the Court only on the written complaint of the Registrar, General Registration. Accused, therefore, had *prima facie* not committed the offence under Sections 193 and 205, P.P.C. Show-cause notice issued to accused by Sessions Court and the cognizance of said offences taken by it being bad in law were set aside. **1996 P Cr. L J 1064.**

'Assumed character' : The accused need not have assumed the name and character of the person he is charged with having personated. The offence is committed, even though the individual personated consents to the personation. Any fraudulent gain or benefit to the offender is not an essential element of this offence. **(1903) 5 Bom. L R 138.**

206. Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution : Whoever fraudulently removes, conceals, transfers or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : A civil suit must be actually pending before a Court and not merely intended to be filed, before a person can prosecute another under this section and Section 207 for a fraudulent transfer of property likely to be taken in execution of the civil decree that is passed or likely to be passed. **(1930) 8 Rang. 268.**

'Whoever' : The offence may be committed by any one and not necessarily by the owners of the property.

"Fraudulently" : Fraudulent removal or concealment is a matter of the essence of the offence under this section. There must be a fraudulent removal, sale or transfer of property, or of some interest, therein, intending thereby to prevent that property from being taken as a forfeiture or in satisfaction of a fine.

"Transfers" : An act by which a living person convey property, in present or in future, to one or more other living persons, is transfer of property. A creditor commits no fraud, who anticipates other creditors and obtains a discharge of his debt by the assignment of any property, which has not already been attached by another creditor.

207. Fraudulent claim to property to prevent its seizure as forfeited or in execution : Whoever fraudulently accepts, receives or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

208. Fraudulently suffering decree for sum not due : Whoever fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him fraudulently suffers a judgment to pass against him for a larger amount at the suit of B, who has no just claim against him, in order that B, either on his own account or for the benefit of Z, may share in the proceeds of any sale of Z's property which may be made under A's decree. Z has committed an offence under this section.

209. Dishonestly making false claim in Court : Whoever fraudulently or dishonestly, or with intent to injure any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

COMMENTS

Scope : To constitute this offence, not only the claim must be false within the knowledge of the person making it, but the object of it must be to defraud, to cause wrongful loss or wrongful gain to injure or to annoy. The section punishes the making of a false claim. The offence will be complete as soon as a suit is filed. If a person applies for the execution of a decree which has already been executed, his act is an offence under the next section.

Respondents vexing petitioner again and again by filing frivolous civil suits relating to same land. All the suits filed by respondents against petitioner were disposed of by Courts as frivolous and vexatious. High Court while quashing proceedings in the last suit advised petitioner that if so advised he might prosecute respondents under Section 209, P.P.C. for fraudulently or dishonestly making a false claim or under Section 193, P.P.C. for falsely verifying the plaints. **1994 C L C 2443.**

"Any person" : The word "any" is significant. It is not necessary that the party to whom the offender intends to cause wrongful loss or annoyance should be the party against whom the suit is instituted. The object of the suit may be to defraud a third party.

A Court of Justice : It is immaterial whether the Court in which the false claim was instituted had jurisdiction to try the suit or not. The words in the section are "a Court of Justice", and not "a Court of Justice having jurisdiction."

210. Fraudulently obtaining decree for sum not due : Whoever fraudulently obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section is a counterpart of Section 208 in respect of fraudulent decrees, just as section 207 is the counterpart of Section 206 in respect of fraudulent transfers and conveyances; the object of the Code being to penalise both parties alike. This section taken together with Section 208 will enable both plaintiff and defendant in a fraudulent or collusive suit, or execution to be dealt with alike. Section 208 punishes the fraudulent defendant, this section, the fraudulent plaintiff.

211. False charge of offence made with intent to injure : Whoever with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both,

and if such criminal proceeding be instituted on a false charge of an offence punishable with death, imprisonment for life or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Scope : The mere lodging of information with the Police is not a charge within the meaning of Section 211, P.P.C. There must be definite accusation made if a charge under Section 211, P.P.C. is to be substantiated and that a mere suggestion or expression of opinion would be insufficient to convict a person under this section. As statement made to the police of a suspicion that a particular person has committed an offence is not a "charge" within the meaning of this section; nor does it amount to the institution of criminal proceedings against that person so as to justify a conviction under this section on the suspicion being proved to be unfounded. A reckless statement, though it may be made in bad faith and may be evidence of malice, is not evidence of the knowledge of the falsehood of the charge. There must be absence of just or lawful grounds for lodging a complaint and unless these factors are proved, a conviction under this section of the P.P.C. would be bad in law. **P L D 1954 Bal. 14.**

Ingredients : The necessary ingredients of a charge under this section are :

1. Intention to cause injury to a particular person.
2. Such injury intended by--
 - (a) instituting or causing to be instituted criminal proceeding against that person, or
 - (b) falsely charging him with having committed an offence.
3. Knowledge of there being no just or lawful ground for such proceeding or charge against that person.

Conviction under both Sections 182 & 211, P.P.C. not possible : According to the case of *Muhammad Alam v. State*, provisions of Sections 182, P.P.C. & 211, P.P.C. being similar in nature, accused cannot be convicted for both the offences simultaneously. **1997 M L D 1182.**

An offence under Section 182 is included in the more serious offence falling under Section 211, and a prosecution for a false charge may be either under Section 182 or Section 211 though clearly if Section 211 does apply and the false charge is serious, prosecution should be under Section 211. But this does not mean that where an offence under Section 182 is complete and prosecution is lodged under Section 182, the proceedings under Section 182 must subsequently be quashed merely because the accused, not content with the false report

to the police, had subsequently made a false complaint to a Magistrate, in addition, and thereby exposed himself to a prosecution under Section 211. A repetition of the same complaint to a different person and under different circumstances would not render the person, who made the false complaint, free from liability to prosecution for an offence which he had already committed and which was complete in itself. **P L D 1951 Lah. 405.**

False complaint to police officer followed by a complaint to the Court. Complaint if false has to be dealt with by Court under Section 211 and proceedings under Section 182 are not sustainable. **P L D 1975 Kar. 87.**

Injury : This means any harm illegally caused to any person in body, mind, reputation, or property (*vide* Section 44). The foundation of the action is malice and malice may be shown at any time in the course of inquiry of criminal proceeding :--

The feature of a criminal proceeding, which distinguishes it from a civil proceeding, is that it lies in criminal Court under the adjective law while a civil proceeding lies in a Civil Court. Both preponderance of authority and the argument *a priori* lead to the conclusion that the true meaning of the expression "criminal proceeding" is a proceeding which lies under the Law of Procedure in a Criminal Court and which is in accordance with some requirement of or is performed under some power conferred by the relevant procedural provisions. The mere making of a complaint (the word being used in a general sense and not in the technical sense of Criminal Procedure Code) whether orally or in writing, against a person under Section 107, Criminal Procedure Code and any steps which the Magistrate may take to verify the trust of the allegations before he issues notice to the opponent are not within the expression "criminal proceeding". **P L D 1949 Lah. 477.**

A criminal proceeding is not necessarily one which is taken under the Penal Code. Any proceeding which relates to an offence will be covered by the expression. Thus a prosecution for an offence under the Municipal Act will also be a criminal proceedings. **P L J 1973 Lah. 352.**

Cases not caused by section : When once information is given to police about a cognizable offence, any statement subsequently made by another person to the police is a statement made in police investigation and cannot be made the foundation of a prosecution under this section though it is false. **A I R 1936 Mad. 160.**

It is enough if it appears that the charge was deliberately made before an officer of police with a view to its being brought before a Magistrate. It is not necessary that the charge must have been fully heard and dismissed.

'False charge should be made to Court or officer having jurisdiction to investigate': The false charge must be made to a Court or to an officer who has power to investigate and send up for trial. It must be an accusation made with the intention to set the law in motion.

'Knowing that there is no just or lawful ground for such proceeding or charge' : To constitute this offence it must be shown that the person instituting criminal proceedings knew that there was no just or lawful ground for such proceedings. This expression means "an honest belief in the guilt of the accused based upon a full conviction, found upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be, *first*, an honest belief of the accuser in the guilt of the accused; *secondly*, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; *thirdly*, such secondly mentioned belief must be based upon reasonable grounds; by this is meant such grounds as would lead any fairly cautious man in the defendant's situation so to believe; *fourthly*, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."

False charge : Failure on the part of the complainant to establish the truth of his allegation does not by any means justify the inference that the complaint was false; and to secure a conviction in this class of cases it must further be established beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence.

Where the case was *prima facie* made out in the Court but the accused was acquitted eventually it was *held* that the charge had been made in good faith and the offence under Section 211 was not substantiated. **P L D 1965 Dacca 543.**

There must be absence of just lawful grounds for lodging a complaint and unless these factors are proved a conviction under this section would not be sound. **P L D 1954 Bal. 14.**

212. Harboursing offender : Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment,

if a capital offence : shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine,

if punishable with imprisonment for life, or with imprisonment : and if the offence is punishable with imprisonment for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine,

and if the offence is punishable with imprisonment which may extend to one year, and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

"Offence" in this section includes any act committed at any place out of Pakistan, which, if committed in Pakistan, would be punishable under any of the following sections, namely 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460 : and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in Pakistan.

Exception : This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

Illustration

A knowing that B has committed dacoity, knowingly conceals B in order to screen him legal punishment. Here, as B is liable to imprisonment for life, A is liable to imprisonment of either description for a term not exceeding three years, and is liable to fine.

COMMENTS

Scope : This section applies to the harbouring of persons who have actually committed certain offences under the Penal Code or an offence under some special or local law, when the thing punishable under such special or local law is punishable with imprisonment for a term of one year or upwards. It supposes that some offence has actually been committed, and that the harbourer gives refuge to one whom he knows or has reason to believe to be the offender with the intention of screening him from legal punishment. It does not apply to the harbouring of

persons not being criminals, who merely abscond to avoid or delay a judicial investigation. (1945) 24 Pat. 604.

No harbouring or concealment is punishable unless there was an offence and the accused knew that the person harboured is the offender. P L D 1995 Quetta 108.

Ingredients : The section has three essentials :

1. Commission of an offence.
2. Harbouring or concealing the person known or believed to be the offender. .
3. Such concealment must be with the intention of screening him from legal punishment.

Exception : The exception only extends to the cases where harbour is afforded by a wife or husband. No other relationship can excuse the wilful receipt or assistance of felons; a father cannot assist his child, a child his parent, a brother his brother, a master his servant, or a servant his master.

213. Taking gift, etc., to screen an offender from punishment:

Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment;

if a capital offence : shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment : and if the offence is punishable with imprisonment for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for offence, or with fine, or with both.

COMMENTS

Scope : This section is applicable when the person accepting the gratification is not a public servant. If he is a public servant, there would appear to be no advantage in referring to this section and the offence might more properly be dealt with as one under Sections 161 or 162. (1946) 47 Cr. L J 623.

The compounding of a crime by some agreement not to bring the criminal to justice. If the property is restored or a pecuniary or other gratification is given is the offence punished by this and the following sections. This section does not apply where the compounding of an offence is legal. It is the duty of every State to punish criminals. No individual has, therefore, a right to compound any crime, because he himself is injured and no one else.

Object : This section and Section 214 are intended to prevent the suppression of prosecutions in cases in which the public is thought to be deeply interested in the punishment of the offender. They impose penalties on transactions entered into with this view.

Ingredients : The section has two essentials :--

1. A person accepting or attempting to obtain any gratification or restitution of property for himself or any other person.
2. Such gratification must have been obtained in consideration of (a) concealing an offence, or (b) screening any person from legal punishment for an offence, or (c) not proceeding against a person for the purpose of bringing him to legal punishment.

214. Offering gift or restoration of property in consideration of screening offender : Whoever gives or causes or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment;

if a capital offence : shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment : and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine :

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception : The provisions of Sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.

Illustrations

[Rep. by the Code of Criminal Procedure, X of 1882].

COMMENTS

Scope : The last section punished the receiver of a gift in consideration of compromising an offence; this section punishes the offerer of the gift. The offence of giving a gratification to any person in consideration of that person concealing any offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, may be committed not only in respect of a completed offence, but also in respect of an offence, which it is proposed to commit.

Ingredients : This section has two essentials :--

1. Offering any gratification or restoration of property to some person.
2. Such offer must have been in consideration of that person's (a) concealing an offence, or (b) of his screening any person from legal punishment for an offence, or (c) of his not proceeding against a person, for the purpose of bringing him to legal punishment.

Whoever : This word is wide enough to include the person who committed the offence sought to be concealed or screened as well as a third party. This section, therefore, includes

the offer of a bribe by the person who has committed the offence that he desired to screen.
1 Weir 194.

'Compounded' : Compounding an offence is more than a mere promise to withdraw prosecution. It supposes an arrangement by which the parties have settled their differences, and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue. Unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition. 1 L R 21 Cal. 115.

215. Taking gift to help to recover property, etc. : Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Object : This section is primarily aimed at professional trackers and other persons who, being usually in league with thieves or well aware of their proceedings, obtain money, etc., for the recovery of stolen property, without making any effort to bring the offenders to justice, and does not apply to the actual thief but to some one who, being in league with the thief, received some gratification on account of helping the owner to recover the stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence.

Ingredients : This section has three essentials :--

1. Taking or agreeing or consenting to take any gratification under pretence or on account of helping any person to recover any movable property.
2. The owner of such property must have been deprived of it by an offence punishable under the Penal Code.
3. The person taking the gratification must not have used all means in his power to cause the offender to be apprehended and convicted of the offence.

Once elements constituting an offence under Section 215 of the Pakistan Penal Code are established by evidence, the onus proving that the person charged entitled to the benefit of exception lies on the defence. In a prosecution under Section 215 of the Code it is not for the prosecution to prove the negative that the accused did not use all means in his power to cause the offender to be apprehended. It is for the defence to establish the positive fact that they did all in their power to cause the offender to be apprehended. P L D 1965 Dacca 387.

216. Harboursing offender who has escaped from custody or whose apprehension has been ordered : Whenever any person convicted of, or charged with an offence, being in lawful custody for that offence, escapes from such custody,

or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or

conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say:

if a capital offence : if the offence for which the person was in custody or is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment : if the offence is punishable with imprisonment for life or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine;

and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence or with fine, or with both.

"Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of Pakistan which, if he had been guilty of it in Pakistan would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in Pakistan, and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in Pakistan.

Exception : This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

COMMENTS

Scope : This section makes it punishable to harbour or conceal a person for whose apprehension an order has been passed by a public servant, even when such apprehension is ought to be made not for the purpose of trying him for an offence that he may have committed, but for enforcing a punishment already inflicted on him for having committed, the offence.

Story as made out by police against accused appeared to be intrinsically false and hollow. Police party was standing at place which was a thoroughfare and it was not difficult for police party to associate any independent witness with 'Naka' but no witness from area was associated who could have witnessed the occurrence. Prosecution having failed to connect accused with crime beyond reasonable doubt, accused was acquitted giving him benefit of doubt. 1995 M L D 1291.

'Knowing of such escape or order for apprehension' : The word 'knowing' means something more than and different from the words 'had reason (or sufficient cause) to believe.' The latter words might be satisfied though no warrant had in fact been issued, 'Knowing' however implies a fact which can be shown. It does not necessarily import actual evidence of senses, but it does import knowledge of something actual by means of authentic or authoritative information. It must be proved by legal evidence that an order for the arrest of the person alleged to have been harboured was made and that the accused knew of the order and harboured the person concerned with such knowledge.

'Harbours or conceals being apprehended' : The word 'harbour' does not only mean to provide shelter, food and clothing but includes the assisting of the person in any way to evade apprehension. The mere giving of a meal to a proclaimed offender is not an offence

within the meaning of this section in the absence of any evidence to the effect that the intention of the accused was to prevent the offender from being apprehended. **A I R 1925 Sind 295.**

¹**[216-A. Penalty for harbouring robbers or dacoits :** Whoever, knowing or having reason to believe that any persons are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity, or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation : For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without Pakistan.

Exception : This provision does not extend to the case in which the harbour is by the husband or wife of the offender.]

COMMENTS

Scope : This section was to enable the Court to inflict enhanced punishment where the persons harboured are robbers or dacoits or where they intend to commit robbery or dacoity. It is not enough that the person charged under this section should be harbouring dacoits in general, but he should be harbouring persons who intend to commit a particular dacoity. **A I R 1925 Sind. 295.**

When a person charged with the substantive offence of dacoity or robbery has been acquitted of that offence another person who is said to have intended to screen him from legal punishment in respect of that offence cannot be held guilty of harbouring the alleged offender under this section.

216-B. Definition of "harbour" in Sections 212, 216 and 216-A : [Omitted by the Penal Code (Amendment) Act, VIII of 1942, S. 3].

217. Public servant disobeying direction of law with intent to save persons from punishment or property from forfeiture : Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section and the three following sections deal with disobedience on the part of public servants in respect of official duty. Their proper place is in Chapter IX. This section makes punishable a certain dereliction of duty quite apart from the question as to whether any bribe is paid to induce such dereliction. The dereliction must clearly, from the nature of the definition of the offence, be committed in the discharge of the functions of the person charged. **(1946) 47 Cr. L J 623.**

Where several persons were apprehended at night time on suspicion of having committed culpable homicide, the police officer tied them together by the hands, and kept

1. Sec. 216-A ins. by the Criminal Law (Amendment) Act, III of 1894.

them in the village in which they had been arrested instead of at once taking them to the nearest police station but the accused escaped in the course of the night, it was *held that* the police officer did not commit an offence under this section because his intention in keeping the accused in the village was merely to wait until it was more convenient to start, and the disobedience of the rule of law was, therefore, not such a disobedience as this section contemplates. **P.R. No. 18 of 1871.**

218. Public servant framing incorrect record or writing with intent to save person from punishment or property from forfeiture : Whoever, being a public servant, and being as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

Scope : This section deals with the intentional preparation of a false record with the object of saving or injuring any person or property. The correctness of records is of the highest importance to the State and to the public. The intention with which the public servant does the acts mentioned in the section is an essential ingredient of the offence punishable under it. **(1867) 8 W R 27 (Cr.).**

Ingredients : This section has three essentials :--

1. The offender must be a public servant charged with the preparation of a record or writing.
2. He must have framed that record or writing incorrectly.
3. He must have done so with intent to cause or knowing it to be likely that he will thereby--
 - (a) cause loss or injury to the public or any person, or
 - (b) save any person from legal punishment, or
 - (c) save any property from forfeiture or other charge to which it is legally liable.

According to case of *Muhammad Nawaz Sharif v. Special Court*, **1997 Cr. L J 502; 1998 P Cr. L J 162.** ingredients of Section 218 would not be made when there is no allegation against accused of having prepared any incorrect record.

Where a public servant, who was in charge of certain documents, was required to produce them, but being unable to do so, fabricated and produced similar documents with the intention of screening himself from punishment, it was *held that* such fabricated documents not being records or writings with the preparation of which such public servant as such was charged, he could not legally be convicted under this section.

Documents produced in another case, consideration of : Court can take into consideration the evidence produced in a particular case and no reference could be made to the documents which were produced in some other case. **1994 P Cr. L J 261.**

'With intent to cause loss or injury to the public or to any person' : In order to sustain conviction under Section 218 of the Penal Code it is not sufficient that the entries are incorrect, but it is essential as well that the entry should have been made with the intention mentioned in Section 218. In a case where direct evidence proving the necessary intention is

lacking and the circumstantial evidence is too meagre to support any safe conclusion as to the intention with which the accused made the entry complained of, it cannot be said that an offence under Section 218 has been committed by the accused. **P L D 1957 S C (Ind.) 377.**

'Whoever, being a public servant....charged with the preparation of any record, etc.' : The petitioner was tried for dishonestly preparing false *Abiyana* documents and was convicted to undergo a sentence of one year rigorous imprisonment and a fine of Rs. 5,000. In appeal the High Court modified the charge to be under Section 218, P.P.C. instead of Section 468, P.P.C. without altering the sentence. Before the Supreme Court the point urged was that mere preparation of false or incorrect documents cannot constitute an offence under Section 218, P.P.C. unless it was prepared to cause loss or injury to any person. The contention was repelled observing that obvious effect of that incorrect, false and dishonestly prepared record was that the persons who were not owners or in possession of or who had not cultivated, certain field numbers, were shown as liable to pay the '*Abiyana*' for the same and conversely those who were really liable were not shown. In the circumstances, *held that* the relevant means are clearly existed on the part of the petitioner and the findings of the trial Court is unexceptionable because by committing his forgery he intended to cause wrongful loss to some and wrongful gain to others. **1980 S C M R 908.** The High Court directed its Registrar to draw a complaint against the appellants (a doctor and an A.S.I.) charging them with the preparation of incorrect record and giving false statements. Before issuing the direction in notice was given to the appellants to explain their viewpoint. High Court was of the opinion that the statement in question was not that of the deceased. This presumption was formed because thumb-impression and signatures of the deceased were missing and the A.S.I. had deliberately recorded statements of the deceased under Section 161, Cr.P.C. in order to do away with necessity of obtaining his signature or thumb-impression. It was *held that* had A.S.I. gone to the extent of fabricating statement of the deceased, he could have easily got his thumb-impression on statement even if he was unconscious. It was further *held that* inference drawn by the High Court was not conclusive and it was doubtful if the appellants could be successfully prosecuted for committing the offence under Sections 193 and 219, P.P.C. **1977 S C M R 55.**

Petition filed by accused under Section 265-K, Cr.P.C. for his acquittal dismissed by Special Court--Validity : Nothing was available in record to substantiate the allegation of dishonest misappropriation, conversion to one's own use or disposal of the property in violation of any law constituting criminal breach of trust. In the absence of any allegation against the accused of having prepared any incorrect record, Section 218, P.P.C. was not attracted. Section 5 (2) of the Prevention of Corruption Act, 1947 was also not attracted as there was nothing on record to suggest that the accused had made the allotments of land in question after obtaining illegal gratification or bribe from the allottees. No material was even available on record constituting "misconduct" on the part of accused within the meaning of Art. 2 (A) of P.P.O. 16 of 1977. No probability of conviction of accused under the aforesaid offences being there, his trial was an exercise in futility. Order of Special Court dismissing the application filed by accused under Section 265-K, Cr.P.C. was consequently *set aside* being without lawful authority and the proceedings arising out of the F.I.R. in question were quashed. **1998 P Cr. L J 162.**

Quashing of F.I.R. : Offences under Penal Code, 1860 mentioned in the F.I.R. being scheduled offences were to be investigated and tried in accordance with the provisions of West Pakistan Anti-Corruption Establishment Ordinance, 1961 and the Rules framed thereunder. Accused were public servants and the case against them could not have been registered except under the orders of the Officers mentioned in R. 8(2) of the Punjab Anti-Corruption Establishment Rules, 1985. Local/general police was absolutely prohibited to register a criminal case under the scheduled offences at the ordinary police station. F.I.R. had also revealed that the case against the accused was registered merely on presumptions and suspicions. Direction of the District Magistrate for registration of the case against the accused being illegal, unlawful and nullity in the eyes of law, subsequent registration of the case

through impugned F.I.R. was also illegal being superstructure raised on an illegal direction and the same were consequently quashed. Constitutional petition was accepted accordingly. 1996 MLD 1874.

Petition for leave to appeal against acquittal : Neither the original Mashirnama, subject-matter of the charge, allegedly prepared by the accused nor copy thereof had been produced in the Court, nor circumstances justifying secondary evidence of the same as required under Art. 76 of Qanun-e-Shahadat, 1984, were available. High Court, even otherwise, had applied its conscious mind to the relevant evidence and had given cogent reasons for not relying on prosecution evidence and its judgment acquitting the accused did not suffer from any infirmity. No compelling reason was available to deprive the accused of the benefit of double presumption of innocence earned by them through their acquittal by Court of competent jurisdiction. Leave to appeal was refused in circumstances. 1995 SCMR 246 (c).

219. Public servant in judicial proceeding corruptly making report, etc., contrary to law : Whoever being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENTS

Object : This and the next section deal with corrupt or malicious exercise of the power vested in a public servant for a particular purpose.

'Maliciously' : "Malice in its legal sense means a wrongful act, done intentionally, without just cause or excuse". A man acts maliciously when he wilfully and without lawful excuse does that which he knows will injure another in person or property. The term 'maliciously' denotes wicked, perverse and incorrigible disposition. It means and implies an intention to do an act which is wrongful, to the detriment of another.

Thus where a Police Sub-Inspector wrongfully confined certain persons on charges of gambling in future and extorted money from them by putting them in fear of being prosecuted in Court upon offences which he knew to be false, it was *held that* the offence under this section and not under Section 347 or Section 342 had been committed. AIR 1941 Sind 36.

220. Commitment for trial or confinement by person having authority who knows that he is acting contrary to law : Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENTS

Scope : This section is enacted to prevent abuse of their powers by persons holding any office which gives them authority to commit persons for trial or to confinement. If the act is legal there can be no guilty knowledge, hence, no offence. AIR 1941 Sind 36.

The section applies to persons holding certain offices and not to private persons who have under certain circumstances, the right to confine persons accused of certain offences. Private persons, if they abuse their power, cannot be dealt with under this section.

It is only when there has been an excess, by a police officer, of his legal powers of arrest, that it becomes necessary to consider whether he has acted corruptly or maliciously,

and with the knowledge that he was acting contrary to law. Where the arrest is legal, there can be no guilty knowledge "superadded to an illegal act" such as it is necessary to establish against the accused to justify a conviction under this section.

Every case resulting in acquittal or discharge can't be considered as false so as to give rise to criminal prosecution of Police Officer under Section 220.

221. Intentional omission to apprehend on the part of public servant bound to apprehend : Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say--

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with or liable to be apprehended for, an offence punishable with death; or

with imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for an offence punishable with imprisonment for life or imprisonment for a term which may extend to ten years; or

with imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with imprisonment for a term less than ten years.

COMMENTS

Scope : This section and Section 222 deals with intentional omission to apprehend offenders and intentional suffering or aiding the escape of offenders from confinement. The difference between these two sections is that this section deals with persons charged with or liable to be apprehended for, an offence, whereas Section 222 deals with persons under sentence of a Court of justice for an offence or lawfully committed to custody.

222. Intentional omission to apprehend on the part of public servant bound to apprehend person under sentence or lawfully committed : Whoever, being a public servant, legally bound as such public servant to apprehend or to keep to confinement any person under sentence of a Court of Justice for any offence or lawfully committed to custody, intentionally omits to apprehend such person, or intentionally suffers such person to escape or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows that is to say--

with imprisonment for life or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death; or

with imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to

have been apprehended is subject by a sentence, of a Court of Justice, or by virtue of a commutation of such sentence, to imprisonment for life or imprisonment for a term of ten years or upwards; or

with imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended is subject, by a sentence of a Court of Justice, to imprisonment for a term not extending to ten years or if the person was lawfully committed to custody.

COMMENTS

Or prove points (1), (2) and (3) as above, and further--

- (4) That such person was in confinement under such sentence.
- (5) That the accused was legally bound to keep him in such confinement.
- (6) That he suffered such person to escape, or aided him in escaping or in the attempt to escape.
- (7) That he did so intentionally.

Prove also the offence for which such person was confined.

Or prove the following points :--

- (1) That the accused is a public servant.
- (2) That the person in question had been committed to custody.
- (3) That such committal was lawful.
- (4) That the accused was legally bound to keep him in confinement under such committal.
- (5) That he suffered such person to escape, or aided him in escaping or in the attempt to escape.
- (6) That he did so intentionally.

Procedure : It is not cognizable. Warrant is not bailable if the case is punishable under the first or second clause; bailable if under the third clause. Not compoundable. Triable by Court of Session if the cases falls under the first or second clause; by Court of Session or Magistrate, first class, if it fails under the third.

223. Escape from confinement or custody negligently suffered by public servant : Whoever, being a public servant legally bound as such public servant to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody, negligently suffers such persons to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section applies only to cases where the person, who is allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has merely been arrested, under civil process. This section further extends the principle laid down in the two preceding sections. It punishes a public servant who negligently suffers any person charged with an offence to escape from confinement. The last two sections deal with intentional omission to apprehend such person.

Ingredients : The section has three essentials :--

1. The offender must be a public servant.
2. He must be legally bound to keep in confinement a person charged with or convicted of an offence or lawfully committed to custody.
3. He must negligently suffer such person to escape.

'Charged with or convicted of any offence' : The words "charged with an offence" in this section are used only in the sense of inculpation or accusation of an offence and do not mean "against whom a charge has been framed." Where an officer who was not a police-officer, and 'therefore not legally bound' to keep in confinement a person arrested by a private person for an offence negligently suffered that person to escape from confinement; it was *held* that he could not be convicted under this section.

Where a head constable produced under-trial prisoner before Magistrate and when he came outside of the Court-room, the prisoner escaped from his custody. The prisoner was handcuffed by both hands when he was produced before the Magistrate and when he came out of the Court-room even then he was handcuffed. Defence witnesses stated that they had noticed the prisoner struggling to release his hands from handcuffs. The Court arrived at the conclusion that it was very curious for the witnesses who have seen the prisoner busy in trying to release his hands, yet the head constable could not notice his activities. He could have been more concerned and vigilant to detect or feel the behaviour of the prisoner, he being nearest to the prisoner and charged with duty of keeping him in safe custody. In the circumstances it was *held* that the facts brought on the record were sufficient to prove negligence on appellant's part. **1977 S C M R 121.**

Sentence, reduction in : Accused who had remained in custody for about five months had already been Departmentally punished. Under-trial prisoners and the accused persons had since been arrested. Accused was also not in collusion with the assailants. Sentence of one year's S.I. awarded to accused was reduced to the term of imprisonment already undergone by him, in circumstances. **1994 P Cr. L J 605.**

224. Resistance or obstruction by a person to his lawful apprehension : Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation : The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.

COMMENTS

Scope : This section punishes the persons who offer resistance or obstruction to their lawful apprehension. It requires that the accused person must offer resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he has either been charged or of which he has been convicted. **A I R 1925 Sind 183.**

Ingredients : The section deals with two kinds of offences :--

1. Intentional resistance or illegal obstruction by a person to his lawful apprehension for any offence with which he is charged.
2. Escape or attempt to escape by a person from lawful custody for the offence with which he is charged or of which he has been convicted.

Intentional resistance : 'Intentional' is the most important ingredient of this section and hence if the accused is forcibly snatched away from custody by others, it cannot be said that he intentionally escaped from custody.

Resistance and obstruction : The words 'resistance' and 'obstruction' occurring in Section 224, Pakistan Penal Code have their ordinary meanings and were not intended to include the case of one merely running away to evade arrest by party wanting to apprehend him. No doubt by running away the appellant evaded arrest, but mere evasion of arrest does not amount to offering resistance or obstruction to the arrest which would result only if there were some active opposition to the arrest by force or show of force. If the prosecution had succeeded in establishing that the appellant was carrying a fire-arm which he used to shake off his pursuers, it would have been *held* that he had offered resistance or obstruction to his arrest, though he may not have hurt any one of his pursuers. **P L D 1951 Lah. 276.**

'Charged' : An arrest of a person by an officer authorised in that behalf is a charging, that is, an imputation of the alleged offence though but a *prima facie* imputation until the case goes before some functionary authorised to deal with it. The word 'charged' is used in the popular sense as implying inculpation of an alleged offence as distinguished from a charge formulated after trial.

'Escapes or attempts to escape' : A person is not in lawful custody if the person apprehending him or causing his apprehension has no power to arrest, or if he is arrested on a warrant, not lawfully signed, or by a person who cannot legally arrest, e.g., a Chowkidar, or if he is kept in confinement for receiving illegal punishment.

A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law he commits the offence of escape. Even when the escape is effected by the consent or with the knowledge of the person escorting the prisoner in custody, the accused is no less guilty. The mere fact that a constable in charge of the accused, who was detained in a jail, became insensible was held not to determine the lawful custody of the accused.

An escape from custody, when a person is being taken before a Magistrate for the purpose of being bound over to keep good behaviour, is not punishable under this section for in such a case he is not in custody for an offence. He could, however, be punishable under Section 225-B.

Escape from custody by a thief who had been caught by a private person in the very act of stealing, at a time when the thief was being sent to the nearest police-station in custody of a person, who had not witnessed the offence was held to be an offence under this section.

Judgment reading : "Since the accused has pleaded guilty and prays for mercy he is sentenced to imprisonment till the rising of the Court," *held*, no judgment as contemplated by Section 367 but only a brief note. Accused though pleading guilty, yet Magistrate is not absolved of his responsibility to write a proper judgment. **P L D 1977 Lah. 1063.**

225. Resistance or obstruction to lawful apprehension of another person : Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescue or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with imprisonment for life, or imprisonment for a term which may

extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

or, if the person to be apprehended or, rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued or attempted to be rescued, is liable under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to imprisonment for life or imprisonment, for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

COMMENTS

Object : This section punishes a person who--

- (1) intentionally offers resistance or obstruction to the lawful apprehension of an offender; or
- (2) rescue or attempts to rescue a person from any custody in which he lawfully detained for an offence.

"Intentional resistance " : Intention is an important ingredient in the offence. If the apprehension is not lawful resistance to such apprehension will not be any offence. Where a Sub-Inspector of Police went to a village dressed up in his uniform to arrest the accused in a most illegal and reprehensible manner, it was *held that* the accused could not be held guilty under this section if they offered resistance to the police.

Where a police-officer sent villagers to arrest certain person suspected of theft, contrary to the Code of Criminal Procedure which confers no powers on a police officer to send persons who are not police-officers to make an arrest which he could lawfully make, it was *held that* resistance to villagers did not constitute an offence under this section.

Rescue : Rescue is the act of forcibly freeing a person from custody against the will of those who have him in custody. If the person rescued is in the custody of private person, the offender must have notice of the fact that the person rescued is in such custody.

Lawfully detained : If the person from whose custody rescue is effected has no authority to detain lawfully the person rescued no offence will be committed for effecting the rescue. If a person authorized to arrest has made an arrest and handed over the person arrested to the custody of an agent, such custody continues to be, what it originally was, a lawful custody.

¹[225-A. Omission to apprehend, or sufferance of escape, on part of public servant, in cases not otherwise provided for : Whoever, being a public servant legally bound as such public servant to apprehend, or to keep

1. Section 225-A ins. by the Criminal Law (Amendment) Act, X of 1886.

in confinement, any person in any case not provided for in Section 221, Section 222 or Section 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished--

- (a) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine or with both; and
- (b) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both].

COMMENTS

Scope : This section punishes intentional or negligent omission to apprehend or keep in confinement on the part of a public servant not coming within the purview of Sections 221, 222 or 223. Where a police officer who was entrusted with the custody of an arrested person omitted to secure one of the doors of the room in which that person was confined and the prisoner escaped through that door, it was *held* that the officer was clearly guilty of negligence under this section. **A I R 1930 Pat. 103.**

¹[225-B. Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for : Whoever, in any case not provided for in Section 224 or Section 225 or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENTS

Resistance to arrest must be intentional. A person who makes resistance not knowing that he is being or is about to be, arrested, cannot be convicted on an offence under this section. In order to constitute an offence under this section something more is required than an evasion of arrest or mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest.

Though absconding in order to avoid, being served, with a summons, notice of order is punishable, no provision exists for punishing absconding, in order to avoid arrest under a warrant. The law provides certain alternative coercive procedure against the property of the absconder in such a case.

The gist of the offence under this section is resistance or obstruction to lawful apprehension or escape or rescue from lawful custody or attempt to secure such escape or rescue. For a forcible escape from the custody of a process-server to amount to an offence under this section two pre-requisites must be satisfied and they are:

- (1) That the process-server had legal authority to arrest the accused, and
- (2) That the warrant on the authority of which he was making arrest had been legally issued by a competent authority.

¹ Sec. 225-B ins. by the Criminal Law (Amendment) Act, X of 1886.

Resistance to improper warrant justifiable : It is illegal to convict a person when the warrant was executed by an incompetent person or when it did not contain the name of the person to be apprehended, or when it was void as it did not bear the seal of the Court issuing it or when it was defective as the person who directed the peons to make the arrest was not authorised to do so, or when it did not give the name or designation of the person to whom it was issued for execution, or when it was signed by an officer who was not legally empowered to sign it, or where it was not addressed to the bailiff of the Court.

'Lawfully detained' : A person about to be arrested is entitled to know under what power the constable is arresting him and, if he specifies a certain power which the person knows the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being a lawful one. The prosecution must first establish that the constable who arrested the man had power to act under the specific authority that he claimed to have.

226. Unlawful return from transportation : *[Omitted by the Law Reforms Ordinance, XII of 1972, Section 2 and Sched.]*

227. Violation of condition of remission of punishment : Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced, if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

COMMENTS

Scope : This section is intended to punish a person for violation of the conditions of remission of punishment. In order to constitute offence it must be shown that the accused person had been convicted and sentenced; (b) that he had been granted a remission of punishment conditionally, and (c) that he committed a breach of a condition of the remission.

Section 401 of the Code of Criminal Procedure empowers the appropriate Government to suspend or remit any sentence conditionally, or unconditionally. The present section deals with cases in which remission of punishment is made conditional by the Government. Consequently, where remission is unconditional, no case can arise under this section.

228. Intentional insult or interruption to public servant sitting in judicial proceeding : Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Object : The object is to punish a person who intentionally insults the Court while administering justice. The aim is to keep intact the dignity of the Court and to preserve the confidence of the public in the administration of justice. This section punishes contempt of Court subordinate to the High Court. As far as the Superior Court, i.e., High Courts and the Supreme Court are concerned, thus contempt is punishable under Art. 204 of the Constitution of the Islamic Republic of Pakistan, 1973.

Scope : The power to punish for contempt is an extremely stringent power, which was originally reserved in the English jurisdiction to Courts of Record, and it is in all respects desirable that where it is conferred upon authorities other than Courts of Record by express law, the law should be construed in the narrowest terms in relation to the authorities so

empowered. Reference to Section 228, P.P.C., show that the offence which the Revenue Officer under the East Bengal State Acquisition and Tenancy Act, 1950 purported to punish is one of insult or interruption to "any public servant, while such public servant is sitting in any stage of a judicial proceeding". The Revenue Officer clearly satisfies the description of a public servant and referring to the definition of "judicial proceeding" in Section 4 (1)(f) of the Criminal Procedure Code, it may also be *held that* he was sitting in a stage of such a proceeding since by provisions in the East Bengal State Acquisition and Tenancy Act, 1950 and the Rules thereunder, evidence could legally be taken on oath in such proceeding. But evidence may be so taken in a very considerable number of proceedings before public servants, who are not Courts *eo nomine* and a differentiation thus appears between the provisions of Section 480, Cr.P.C., and those of Section 228, P.P.C., namely, that the power of immediate punishment of such an interruption or insult is not given to every public servant sitting to conduct a judicial proceeding, but is confined by Section 480, to "any Civil, Criminal or Revenue Court". Bearing in mind that it is important to the liberty of subject that power of immediate commitment and punishment for contempt should be confined within the very words of the statute by which it is conferred, the power conferred by Section 480, Criminal Procedure Code, is not exercisable by any person or body other than person or body who is designated as a Court. The Revenue Officer was not so designated, and consequently, he could not exercise power under that section. **P L D 1965 S C 677.**

Mere mention by Court in its show-cause notice about having been insulted or interrupted by the accused while writing a judgment was not enough to infer that Presiding Officer was sitting in a judicial proceeding. Court should have followed the procedure as laid down in Sections 480 and 481, Cr.P.C. and should have recorded the statements of accused and other evidence to prove the fact of being busy in judicial proceedings at the relevant time. Show-cause notice was served on the accused when the Court time was over and without providing an adequate opportunity to them to defend themselves. Court convicted the accused to pay a fine of Rs. 200 each on receiving their reply and also sent them to jail without giving them time to pay the fine. Such steps taken by Court had exhibited its malice, inexperience and an effort to protect its Peshkar who allegedly had accepted illegal gratification. Accused were acquitted in circumstances. **1995 P Cr. L J 1307.**

Court for trial of an offence under Section 228, P.P.C. has to follow the procedure as laid down in Ss. 480 and 481, Cr.P.C. whereunder recording of statement of accused is mandatory. **1995 PCr.LJ 1307 (b).**

Impugning impartiality of Court : The petitioner in an application for adjournment to move for transfer had said that he had absolutely no hope of justice from the Court and prayed that he might be granted an adjournment so that the petitioner could get a just decision in the case. It was *held that* to impugn the impartiality or justice of the Court to its face, constitutes gross contempt and amounts deliberate insult to the Court. Further, that the contention was unacceptable that because of the provisions of Section 526 of the Code of Criminal Procedure, the inclusion of the offending words in the adjournment petition submitted to the trial Court could not in law constitute contempt. It would depend on the circumstances of each case whether an insult was intentionally offered to the Court or not and the fact that it is quite necessary in law to give reasons for making a prayer for adjournment to move for transfer of the case, is a factor which due weight must be attached in that connection. The motive may be to press a defence and yet it may be coupled with an intention to insult the Court. However, excellent the motive may be, if the words constitute an offence, the motive would not make them lawful. In cases where the words used and the absence of necessity for including insulting suggestion in an application of adjournment, clearly suggest that there was an intention to insult the Court such fact should not be passed over in silent. **P L D 1955 Lah. 16.**

An offence under Section 228 of the Penal Code cannot be tried, except by a Court and, under Section 28 of the Criminal Procedure Code, the Court itself must be the Court which has been interrupted or insulted. Section 190 read alongwith the Schedule and Section 476, read alongwith Section 193, would be inapplicable to such case, Sections 480 and 482 are,

therefore, the only sections which can be attracted on the facts of the present case. No other procedure is available. One is, therefore, driven to the position that it is a Court and only a Court which can conduct a trial under Section 228 of the Penal Code. This is the inevitable result of the juxtaposition of the Penal Code and the Criminal Procedure Code, and, the two must be read together, to give a meaning to the provisions of the former. **1968 P Cr. L J 682.**

Where an Advocate, without ceremony of employing normal forms of address, addressing Court in insolvent tones, criticising Court's order as "wrong", refusing to leave Court-room when ordered to withdraw but leaving Court-room, when threatened with forceful expulsion, uttering words "I am going but I shall not withdraw my remarks"; thereafter loudly and vehemently criticising and denouncing Court's order outside Court-room and inciting party affected to disobey Court's order. It was *held that* the Advocate was guilty of grossest contempt. **P L D 1967 Lah. 1231.**

Where a police officer uttered contemptuous remarks against the Court on hearing confirmation order in a bail matter, the Court took cognizance of contemptuous remarks and initiated contempt proceedings against him. He tendered apology which the Court declined to accept. In appeal he contended that the punishing Court being itself subject to contempt, was not competent to convict. The contention was held to be devoid of force in view of sub-clause (4) of Section 5 of the Contempt of Court Act, 1976. **1981 P Cr. L J 1016.**

Quashing of proceedings : According to the case of Labour Court having not been included in Section 476, Cr.P.C. had no jurisdiction to initiate the impugned proceedings against the accused petitioner who was neither a party before the said Court nor before any Civil, Revenue or Criminal Court. Presiding Officer of the Labour Court in order to justify his action had wrongly posed and shown himself in the impugned order as District and Sessions Judge in addition to his being the Presiding Officer of the Labour Court. Said Presiding Officer had straightaway found the accused guilty under Section 228, P.P.C. and Sections 3 and 4 of the Contempt of Court Act, 1976, who was taken into custody and remanded to jail and thereafter, a show-cause notice was given to him for initiating proceedings under Section 476, Cr.P.C. Presiding Officer of Labour Court did not even file any complaint in writing as contemplated under Section 195(1), Cr.P.C. and he had also violated Section 38(5) of the Industrial Relations Ordinance, 1969 by taking action of contempt of Court himself and not referring the matter to Labour Appellate Tribunal. Entire exercise taken by the said Presiding Officer of the Labour Court was wholly illegal and without lawful authority. Proceedings pending against the accused were consequently quashed. **1997 P Cr. L J 1584.**

229. Personation of a juror or assessor : Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned, empanelled or sworn as a juror or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled or sworn or knowing himself to have been so returned, empanelled or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section is intended to punish false personation of a juror or an assessor. It deals with two classes of cases: (1) where the accused had guilty knowledge before he was returned, i.e., got himself enlisted as a juror or assessor, and (2) where he had such knowledge after he was returned.

Six sections of the Code deal with false personation, viz., Sections 140, 170, 171, 171-F, 205 and 229.

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS

230. "Coin" defined : Coin is metal used for the time being as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used.

Pakistan coin : Pakistan coin is metal stamped and issued by the authority of the Government of Pakistan in order to be used as money; and metal which has been so stamped and issued shall continue to be Pakistan coin for the purposes of this Chapter, notwithstanding that it may have ceased to be used as money.

Illustrations

- (a) Cowries are not coin.
- (b) Lumps of unstamped copper, though used as money, are not coin.
- (c) Medals are not coin, inasmuch as they are not intended to be used as money.
- (d) & (e) [Omitted by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.]

COMMENTS

Legal tender not necessary : This section defines coin and Pakistan coin. Coin is, therefore, not necessarily one which is legal tender in Pakistan but may include foreign coin as well.

The test of whether a particular piece of metal is money or not is the possibility of taking it into the market, and obtaining goods of any kind in exchange for it. For this, its value must be ascertained and notorious; that it is known to persons of special skill or information is not sufficient.

231. Counterfeiting coin : Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation : A person commits this offence who intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.

COMMENTS

Scope : This section punishes counterfeiting of coins.

To be counterfeit within the meaning of this section the coin must resemble or be apparently intended to resemble a pass for a genuine coin. The word 'counterfeiting' involves an intention in practice deceit by causing one thing to resemble another thing.

'Counterfeits' : A "counterfeit coin" means a coin not genuine, but resembling, or apparently intended to resemble, or pass for genuine coin; and includes genuine coin prepared or altered so as to resemble or pass for coin of a different denomination.

'Performs any part of the process of counterfeiting' : The offence is deemed complete even if the coin may not be in a fit state to be uttered or the work may not be finished, or perfected. The section equally whether the act of counterfeiting is complete or not will apply.

Where a genuine sovereign had been fraudulently filed at the edges to such an extent as to reduce the weight by one-twenty-fourth part, and to remove the milli. g entirely, or almost

entirely, and a new milling had been added in order to restore the appearance of the coin, it was held that the coin was false and counterfeit.

232. Counterfeiting Pakistan coin : Whoever counterfeits, or knowingly performs any part of the process of counterfeiting Pakistan coin, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

The only difference between this section and the preceding section is that this section imposes a heavier penalty than the previous section.

To constitute the offence there must be an intention that the coins made will be used as Pakistan coin or a knowledge that they are likely to be used as such. Such knowledge or intention will be inferred from the mere fact of counterfeiting except under circumstances which conclusively negative it; but a distinction must be drawn between a deception practised for show merely, and one practised for wrongful loss or gain, and the former... not an offence under the Penal Code. If the intention of the person who makes coin resembling genuine coins is to forst a false case upon his enemy by introducing the coins into his house and not to put the coins in circulation, no offence is committed under this section. **399 Cr. L J 51.**

Circulation of spurious coin not necessary : It is not necessary that the accused should have intended that the spurious coins should go into circulation and be used as money. It is sufficient if there is an intention to practise deception by means of the imitation.

233. Making or selling instrument for counterfeiting coin : Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

234. Making or selling instrument for counterfeiting Pakistan coin : Whoever makes or mends, or performs any part of the process of making or mending or buys, sells or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting Pakistan coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

235. Possession of instrument or material for the purpose of using the same for counterfeiting coin : Whoever is in possession of any instrument or material, for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

if Pakistan coin : and if the coin to be counterfeited is Pakistan coin, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Object : This section punishes the person who is in possession of any instrument or material for the purpose of using the same for counterfeiting coins.

Possession : The word "possession" connotes the intention to exercise power or control over the object possessed and therefore necessarily implies that the possessor has been conscious of the possibility of exercising that power or control. All that is required to convict a person under this section is that he should be in possession of the material for counterfeiting but possession should be exclusive. **1 Cr. L J 40.**

The offence of counterfeiting coin is very serious and an exemplary sentence should be given. But when a man is being convicted for being in possession of instruments or materials for counterfeiting coin it is hardly right to convict him separately for being in possession of various parts of such instruments or materials. **A I R 1930 Lah. 51.**

236. Abetting in Pakistan the counterfeiting out of Pakistan of coin : Whoever, being within Pakistan, abets the counterfeiting of coin out of Pakistan shall be punished in the same manner as if he abetted the counterfeiting of such coin within Pakistan.

237. Import or export of counterfeit coin : Whoever imports into Pakistan, or exports therefrom, any counterfeit coin, knowingly or having reason to believe that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

238. Import or export of counterfeits of Pakistan coin : Whoever imports into Pakistan, or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of Pakistan coin, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

239. Delivery of coin, possessed with knowledge that it is counterfeit : Whoever, having any counterfeit coin, which at the time when he became possessed of it he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENTS

Object : The offence for which punishment is provided by this section is not the offence committed by the coiner. It is directed against a person other than the coiner who procures or obtains or receives counterfeit coin and not to the offence committed by the coiner. The receipt of the false coin, knowing at the time it is received that it is counterfeit, is made the test of a person being such a dealer. The offence contemplated in this section is the delivery or an attempt to deliver by such a dealer to some person whether an accomplice or not.

240. Delivery of Pakistan coin possessed with knowledge that it is counterfeit : Whoever, having any counterfeit coin, which is a counterfeit of Pakistan coin, and which, at the time when he became possessed of it, he knew to be a counterfeit of Pakistan coin, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Scope : The offence under this section is an aggravated form of the offence described in the last. This section does not apply to the actual coiner. The offence under it is committed even though the coin is refused by the person to whom it is offered.

241. Delivery of coin as genuine, which, when first possessed, the deliverer did not know to be counterfeit : Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit as the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Illustration

A, a coiner, delivers counterfeit rupees to his accomplice B, for the purpose of uttering them. B sells the rupees to C, another utterer, who buys them knowing them to be counterfeit, C pays away the rupees for goods to D, who receives them, not knowing them to be counterfeit. D after receiving the rupees, discovers that they are counterfeit and pays them away as if they were good. Here D is punishable only under this section, but B and C are punishable under Section 239 or 240, as the case may be.

COMMENTS

Scope : This section applies to a casual utterer of base coins. Section 239 deals with professional utterers. A casual utterer may not be aware that the coins was counterfeit at the time when he took it into his possession but he is responsible if he utters it knowingly. Use of counterfeit coins knowing them to be counterfeit is sufficient for conviction under this section. **A I R 1937 Nag. 133.**

242. Possession of counterfeit coin by person who knew it to be counterfeit when he became possessed thereof : Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

243. Possession of Pakistan coin by person who knew it to be counterfeit when he became possessed thereof : Whoever, fraudulently or with intent that fraud may be committed, as in possession of counterfeit coin, which is a counterfeit of Pakistan coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

The offence under this section is an aggravated form of the offence described in the last section.

As under the last section, it must be possession with intent to defraud or with intent that fraud may be committed. The intention of the accused may be implied from the nature of bulk of the objects themselves or from surrounding circumstances indicating a conscious retention implied in the word "possession." **1 Cr. L J 960.** So where eleven silver pieces of the size of a rupee alongwith thirty counterfeit rupees, all bearing the same year, were found concealed under sawdust in a locked room, the key of which was in possession of the accused, it was

held that the circumstances created a presumption of guilt in the case of accused that he was in possession of the coins fraudulently or with intent to commit fraud.

It must also be shown that at the time of coming into possession of the counterfeit coins the accused knew them to be counterfeit. A person who innocently comes into possession of counterfeit coins does not become liable under Section 243 by his subsequent discovery that they are counterfeit coins and retention of them. **A I R 1950 All. 732.**

For conviction under Section 243, it is essential that the counterfeit coin must be of such a character that it would be possible to pass it off as a genuine coin. Where the evidence of the expert is that it is not possible to pass off the counterfeit coin as genuine, the accused cannot be said to have committed an offence under Section 243. **A I R 1960 Bom. 51.**

244. Person employed in mint causing coin to be of different weight or composition from that fixed by law : Whoever, being employed in any mint lawfully established in Pakistan, does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

245. Unlawfully taking coining instrument from mint : Whoever, without lawful authority, takes out of any mint, lawfully established in Pakistan, any coining tool or instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

246. Fraudulently or dishonestly diminishing weight or altering composition of coin : Whoever fraudulently or dishonestly performs on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation : A person who scoops out part of the coin and puts anything else into the cavity alters the composition of that coin.

247. Fraudulently or dishonestly diminishing weight or altering composition of Pakistan coin : Whoever fraudulently or dishonestly performs on any Pakistan coin, any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

248. Altering appearance of coin with intent that it shall pass as coin of different description : Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

249. Altering appearance of Pakistan coin with intent that it shall pass as coin of different description : Whoever performs on any Pakistan coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be

punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

250. Delivery of coin, possessed with knowledge that it is altered : Whoever, having coin in his possession with respect to which the offence defined in Section 246 or 248 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

251. Delivery of Pakistan coin possessed with knowledge that it is altered : Whoever, having coin in his possession with respect to which the offence defined in Section 247 or 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

252. Possession of coin by person who knew it to be altered when he became possessed thereof : Whoever fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the Section 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

253. Possession of Pakistan coin by person who knew it to be altered when he became possessed thereof : Whoever fraudulently or with intent that fraud may be committed, is in possession of coin with respect of which the offence defined in either of Section 247 or 249 has been committed having known at the time of becoming possessed thereof, that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

254. Delivery of coin as genuine which, when first possessed, the deliverer did not know to be altered : Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in Sections 246, 247, 248 or 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years,

or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

255. Counterfeiting Government stamp : Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation : A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

256. Having possession of instrument or material for counterfeiting Government stamp : Whoever has in his possession any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

257. Making or selling instrument for counterfeiting Government stamp : Whoever makes or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

258. Sale of counterfeit Government stamp : Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

259. Having possession of counterfeit Government stamp : Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use, or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

260. Using as genuine a Government stamp known to be counterfeit : Whoever uses as genuine any stamp knowing it to be a counterfeit of any stamp issued by Government for purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

261. Effacing writing from substance bearing Government stamp, or removing from document a stamp used for it, with intent to cause loss to Government : Whoever fraudulently or with intent to cause loss to the Government, removes or effaces from any substance bearing any stamp issued by Government for the purpose of revenue, any writing or document for

which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

262. Using Government stamp known to have been before used : Whoever fraudulently or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

263. Erasure of mark denoting that has been used : Whoever, fraudulently or with intent to cause loss to Government, erases or removes from a stamp issued by Government for the purpose of revenue, any mark, put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession or sells or disposes of any such stamp from which such mark has been erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years or with fine, or with both.

¹[263-A. Prohibition of fictitious stamp : (1) Whoever--

- (a) makes, knowingly alters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or
- (b) has in his possession, without lawful excuse, any fictitious stamp, or
- (c) makes or, without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees.

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and shall be forfeited.

(3) In this section "fictitious stamp" means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in Sections 255 to 263, both inclusive, the word "Government" when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in Section 17, be deemed to include the person or persons authorised by law to administer executive Government in any part of Pakistan, and also in any foreign country.

1. Sec. 263-A ins. by the Criminal Law (Amendment) Act, III of 1895.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES

264. Fraudulent use of false instrument for weighing : Whoever fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENTS

Scope : This section deals with fraudulent use of any instrument of weighing. The instrument used must not only be known to be false but must also be fraudulently so used, that is, it must be used for the purpose of passing off short weight upon persons who are entitled to full weight.

Where the incorrectness of the scale is so visible, and there is no attempt to cover or conceal it, there can be no ground for imputing fraud from that defect alone; the circumstances negative the intention of fraud, and no charge would lie against the party using such a balance. On the other hand a false balance artfully contrived to elude detection in the use of it, carries with it a presumption of fraudulent intention, which properly brings it within the scope of the chapter."

265. Fraudulent use of false weight or measure : Whoever fraudulently uses any false weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both.

COMMENTS

Scope : The section has no application in cases in which the accused did not profess to sell by any standard weight or measure, e.g., a sale by the measure of a cocoanut shell. **1 Weir 22.**

'False' : The false weight or measure must be a prescribed weight or measure. Selling by means of an unstamped measure does not, in the absence of evidence of fraud or falsity of the measure, constitute this offence.

In considering whether a weight used is false or not a small deficiency for instance, a deficiency of one total is a five seer weight, should not count. **1883 A W N 224.**

Complaint : The Code of Criminal Procedure does not required any complaint for taking cognizance of an offence under this section, but it has been *held that* a conviction under this section cannot be maintained where there is no complaint by the Purchaser. **9 Cr. L J 4.**

266. Being in possession of false weight or measure : Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENTS

The gist of an offence under Section 266, Penal Code is to possess a false weight intending that the same may be fraudulently used. The weight and measure is said to be false within the meaning of Section 266, Penal Code if it is something other than what it purports to be. If the weight is more or less in weight, then the standard weight, then it shall be said that the weight is a false one. The element of a false weight or measure does not enter into the ingredients of an offence under Sections 25, 28 or 30 of the Punjab Weights and Measures Act. So, the possession of a false weight with intention that the same may be fraudulently used is covered by Section 266, Penal Code and not by Sections 25, 28 or 30 of the Punjab Weights and Measures Act and, therefore, prosecution for the same under Section 266, Penal Code, 1860 is not only proper but more appropriate. **P L D 1960 Azad J & K 18.**

267. Making or selling false weight or measure : Whoever makes, sells or disposes of any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

CHAPTER XIV

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS

268. Public nuisance : A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

COMMENTS

Scope : This section only defines the offence of public nuisance. Private nuisances are not punishable criminally and are to be dealt with civilly. The offence defined in this section may be analysed thus:

- (1) It may be caused either by an act or illegal omission.
- (2) The effect of such act or omission must be either injury, danger or annoyance.
- (3) It should be actually caused either to the public or to that portion of the public who dwell or occupy property in the vicinity, or
- (4) Threatened of necessity to persons who may have occasion to use any public right.

Where an act is a nuisance to the public it is no defence that it is in itself a perfectly lawful act, and that it is done upon a man's own ground in a convenient place and in a proper manner, for the illegality consists in not using properly so as to harm the public.

Ingredients : The section requires two essentials:

1. A person must do an act or must be guilty of an illegal omission.
2. Such act or omission must cause--
 - (a) common injury, danger, or annoyance (i) to the public, or (ii) to the people in general who dwell or occupy property in the vicinity, or
 - (b) injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

Noise made in carrying on lawful trade under licence, if injurious to physical comfort of community is a public nuisance as contemplated in Section 268, P.P.C. **P L D 1968 Dacca 823.**

The injury contemplated in this section must be common, i.e., it must affect the public and not any solitary individual. The words "public", "in general" and "vicinity" indicate that there can be no public nuisance unless the general public of the locality is affected by the nuisance. The 'annoyance' must also be caused to the general public. An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place or to a few residents of a single house. **P L D 1958 Dacca 425.** Where, therefore, from the noise made by a tinman in carrying on his trade three members of an inn were disturbed in the occupation of their chambers it was held that the nuisance was not of a sufficiently general extent to support an indictment. **(1802) 4 Esp. 200.**

Annoyance in order to be indictable must be caused by danger to life safety, health, or comfort, the act offending sentiment of a particular class or sect is not indictable as public nuisance. Mere fact of Ahmadis believing in Holy Qur'an, Sunnah, and same Fiqah (subject of course to certain alterations) is not a ground to cause any inconvenience or annoyance to any reasonable man to bring it within definition of nuisance under Section 268, P.P.C. Acts of defendants in worshipping in the manner of Muslims and calling Azan and naming their place of worship also in the manner of Muslim held, do not amount to a nuisance or a public nuisance and consequently Section 91, Cr.P.C. is not attracted. **P L D 1978 Lah. 113.**

No prescriptive right in case of nuisance : No prescriptive right can be acquired to maintain, and no length of time can legalize, a public nuisance. Though twenty years' user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, even though of a longer standing, but a statute may authorize and legalize acts which would otherwise amount to a nuisance. **(1904) 1 Ch. 673.**

269. Negligent act likely to spread infection of disease dangerous to life : Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

COMMENTS

If a man is attacked by a contagious and deadly disease and needlessly goes abroad with it in a public way or if a person carries about a child so infected, he does what he may be supposed to know to be likely to spread the infection. And unless some lawful occasion or reason for this conduct can be shown, as that the sick person had been directed to be removed to a hospital and that the removal was performed with due caution, the act will be an offence punishable under this section.

270. Malignant act likely to spread infection of disease dangerous to life : Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

271. Disobedience to quarantine rule : Whoever knowingly disobeys any rule made and promulgated by the Federal or any Provincial Government for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

272. Adulteration of food or drink intended for sale : Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

273. Sale of noxious food or drink : Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Scope : This section is not expressly limited to food intended for human consumption. But as it comes in the Chapter dealing with offences relating to public health, etc., it seems it is not intended to include food or drink for animals. The words 'the public' means human beings in general and do not include animals. According to Webster, 'public' means "the general body of mankind or of a nation, state, or community". Thus, this section does not make the sale of horse's food of grain, or fodder, unfit for a horse to eat, an offence punishable under it.

Section 272 deals with adulteration of food or drink, this section, with the sale or attempted sale of such adulterated noxious articles, and not only such food or drink. This section is more comprehensive in its provisions, and includes, any article of food which has gone bad by being, kept too long, or which never was at any time fit for food; or drink which has gone bad by exposure or by length of time it has been bottled, etc.

Ingredients : This section has the following essentials:--

1. Selling or offering or exposing for sale as food or drink some article.
2. Such article must have become noxious or must be in a state unfit for food or drink.
3. The sale or exposure must have been made with a knowledge or reasonable belief that the article is noxious as food or drink.

274. Adulteration of drugs : Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purposes, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Object : To preserve the purity of drugs sold for medicinal purposes this section is enacted.

To support a conviction under this and the following sections it is sufficient to show that the efficacy of a drug is lessened, it need not necessarily become noxious to life. Under both these sections mixing water with a drug would be penal, but where a drug loses its efficacy by its being kept, the sections do not apply. A person who sells an inferior quality of a drug cannot be convicted because the word 'adulteration' imports an admixture of some foreign substance.

275. Sale of adulterated drugs : Whoever, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with

imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Scope : Offence under this section consists in selling, or offering, or exposing for sale, or issuing from any dispensary, an adulterated drug as unadulterated. Section 273 deals with the sale of an article of food or drink that has become noxious. This section not only prohibits its sale but also its issue from any dispensary.

276. Sale of drug as a different drug or preparation : Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation, as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

277. Fouling water of public spring or reservoir : Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENTS

Voluntarily : To constitute an offence under this section the act of corrupting or fouling the water must be done voluntarily. Intention knowledge that the act done will corrupt or foul the water is thus essential.

'Corrupts or fouls' : The words "corrupts or fouls" in connection with water meant for drinking purposes will mean some act which physically defiles or fouls the water just as spitting into a public well fouls drinking water but the act of a woman of a lower caste taking water from public cisterns of water does not amount to corrupting or fouling. Similarly, a person of a low caste drawing water from a public water of the river and therefore, well, cannot be said to corrupt or foul the well.

'Public spring or reservoir' : These will not include a public river. A public spring will be a spring used by the public whether rightly or not. The strewing of branches in a river for fishing purposes will not foul the water of the river and therefore will be no offence under this section.

278. Making atmosphere noxious to health : Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.

COMMENTS

As the contamination of atmosphere affects the people living in the neighbourhood, this section is not as general as the last one which deals with the fouling of the water of a stream or reservoir. It is not essential that hurt be actually caused. Offensive trades which give out bad smells come under this section.

Fine under Section 278, P.P.C. does not debar the convict from appointment as Lambardar. **P L D 1959 W.P. (Rev.) 171.**

279. Rash driving or riding on a public way : Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to two years or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Scope : This section relates to rash or negligent driving of vehicles or animals. Driving or riding on a public way is rash or negligent if it endangers human life or is likely to cause hurt or injury to any person.

Ingredients : The section requires two essentials :--

1. Driving of a vehicle, or riding on a public way.
2. Such driving or riding must be so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person.

A rash act is primarily an over-hasty act and is thus opposed to a deliberate act, but it also includes an act which, though it may be said to be deliberate, is yet done without due deliberation and caution.

Where rash driving results in collusion between two vehicles the drivers of two vehicles cannot be tried jointly so far as offences under Sections 279 and 336 are concerned. **P L D 1958 Kar. 615.**

Culpable negligence : Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty or circumspection.

Qatl : According to the case of *Taus Khan v. State*, "Qatl" means causing death of a person. Meaning of "Qatl" does not include words of "intention" and "act" for Qatl. Word "Qatl", therefore, cannot be translated as murder or culpable homicide. **1995 M L D 1775.**

Registration of F.I.R. : Police after investigation had already rejected the version of the complainant with regard to the involvement of two persons named by him in the case and a direction for registration of a criminal case against them was not likely to bring about the required results. Complainant could file a private complaint against the said persons which was an equally efficacious remedy particularly when all the evidence required to prosecute them was already in his possession. Constitutional petition was disposed of accordingly. **1997 P Cr. L J 1202.**

Actual injury not necessary : It is not necessary that the rash or negligent act should result in injury to life or property. The mere fact that a public road happens, at the moment, to be empty is not *per se* a ground for acquitting a person of the offence under this section, for his rash driving or riding in such public road is likely to cause injury to human life, even though in point of fact he had, by the intervention of providence, not endangered the safety of any person.

Rash or negligent driving : The manner in which the driving, riding or navigation is performed must be rash or negligent. For establishing criminal liability resulting for negligence or rashness, the degree of proof that would be required has to be very strict. **P L D 1973 Kar. 427.**

The accused was prosecuted for rash driving and convicted. At appellate stage he contended that he was not the driver of the vehicle, and being a poor employee, had been

made a scapegoat to save the officer who was actually driving the jeep. In the absence of any evidence in support of the contention, his plea was rejected. **1982 S C M R 226.**

Mere driving at high speed is not at all relatable to rashness or negligence. **1996 P Cr. L J 848.**

Driving a vehicle at high speed cannot be considered and taken to be a rash and negligent act as modern technology provides for reasonable safeguard of stopping the vehicle within no distance and time. Prosecution in order to prove rash and negligent driving has to establish the failure of the driver to take proper care by omitting to take some action by which he could have avoided the accident. **P L J 1997 Cr.C. (Lah.) 1289; 1998 P Cr. L J 158.**

Conviction and sentence : The accused was proceeded under Sections 279 and 337, P.P.C. and separate sentences were passed on each count. The sentences had to run concurrently. The Supreme Court refused to interfere with the decision upholding the decision of a lower Court, in the circumstances of the case. **N L R 1981 S C J 87.**

Where by rash and negligent driving a death was caused while reversing, truck rashly, the contention by the appellant that accident took place when truck was being reversed and as such cannot be said to be driving rashly. The contention was repelled observing that accident could have been easily avoided, had the appellant taken due care and caution. Sentence in the circumstances was upheld. **P L J 1982 S C 709.**

Petitioner while driving truck rashly and negligently had killed 13 sheep. Neither the petitioner/driver was stated by P.W. to be driving truck, nor was apprehended at the spot. Thanedar himself mentioned his name in F.I.R. P.Ws. neither identified the petitioner in Police Station nor in the Court and nor specifically stated that he was driving truck rashly and negligently. *Held :* Prosecution unable to establish its case. Petitioner acquitted. **K L R 1994 Cr.C. 226.**

Appeal against acquittal : Record did not show that the accused intended to kill someone but in fact the deceased was killed or he wanted to hit some other thing but he missed the target and hit the deceased. None of the ingredients, viz., either mistake in the intention or in the act done by the accused necessary for constituting the offence under Section 8/9 of the Azad Jammu and Kashmir Islamic Penal Laws Enforcement Act, 1974 was either made out or proved by the prosecution. Shariat Court although had acquitted the accused on different and irrelevant considerations under Section 8/9 of the Act of 1974, yet the order of acquittal was maintained on the aforesaid grounds. Similarly no evidence was available on record to show that the vehicle was being driven rashly by the accused and, thus, prosecution had not also proved the offence under Section 279, Penal Code. Appeal against acquittal of accused was dismissed in circumstances. **1997 P Cr. L J 1915.**

Appreciation of evidence : Venue of accident and the manner in which the accident took place both were doubtful. Accused was not proved to have driven his bus rashly or negligently at the time of accident which appeared to have taken place due to defective driving of the complainant. Accused was acquitted in circumstances. **1996 P Cr. L J 848.**

280. Rash navigation of vessel : Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

281. Exhibition of false light, mark or buoy : Whoever exhibits any false light, mark or buoy intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

282. Conveying person by water for hire in unsafe or overloaded vessel : Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

283. Danger or obstruction in public way or line of navigation : Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred rupees.

COMMENTS

Object : This section has been enacted to protect persons in the exercise of their public right. A public nuisance may undoubtedly be caused without any deliberate intention of causing it. This section does not refer to the intention of the accused. The obstruction may be caused by negligence and it is generally so caused. **A I R 1935 All. 746.**

All injuries to a public way, as by digging a ditch or making a hedge across it or laying logs of timber in it, or ploughing it up, or by doing any other act which will render it less commodious to the public, will be punishable under this section.

Ingredients : The section requires two essentials :--

1. A person must do an act or omit to take order with any property in his possession or under his charge.
2. Such act or omission must cause danger, obstruction or injury to any person in any public way or line of navigation.

Thus where a hut encroached upon a public way and caused obstruction it is the person who constructed the hut who is liable and not the person who rented the hut and opened a shop. **1 Cr. L J 244.** Where the defendant, being in possession of land abutting on a public foot-way excavated an area in the course of building a house immediately adjoining the foot-way and left it unprotected and a person walking in the night fell in, the defendant was held to be liable though in point of law the person who fell it was off the road and was in law a trespasser. **9 C B 392.**

To take order : This expression means to dispose of the property in such a way as to prevent the danger, obstruction or injury.

284. Negligent conduct with respect to poisonous substance : Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person,

or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

COMMENTS

The gist of the offence is culpable negligence. The fact that a person has the custody of any dangerous substance suffices itself to impose upon him the duty of being careful; and he is criminally responsible if he negligently omits to take such order with the substance as is sufficient to guard against any probable danger from such substance to human life, whether the substance be poison, or fire, or a combustible or explosive substance or machinery. It is not necessary to constitute an offence under that section, that the negligent omission punishable under it should be followed by any disastrous consequences. **P.R. No. 10 of 1882.**

285. Negligent conduct with respect to fire or combustible matter :

Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

286. Negligent conduct with respect to explosive substance : Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

287. Negligent conduct with respect to machinery : Whoever does, with any machinery, any act so rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any other person,

or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery,

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

288. Negligent conduct with respect to pulling down or repairing buildings : Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard

against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

289. Negligent conduct with respect to animal : Whoever, knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Whoever : It is not only a servant who is actually in charge of an animal, but the master may also be liable under this section. Where an old woman was gored to death by a buffalo, not only the herdsman who was in charge of the animal but also the master was held liable under this section because the buffalo was known to be a dangerous animal which had attacked several persons and no special precautions were taken regarding it. **6 Cr. L J 100.**

"Take such order" : In the case of animals which are tame and mild in their general temper on mischievous disposition is presumed. It must be shown that the accused knew that the animal was accustomed to do mischief. Some evidence must be given of the existence of an abnormally vicious disposition. A single instance of ferocity, even a knowledge that it has evinced a savage disposition, is sufficient notice.

Sessions Court while hearing a revision petition for enhancement of sentence awarded to accused by Trial Court had unlawfully relied upon a certificate produced before it as the same being not a part of evidence on record had to be excluded from consideration. Accused who had already suffered the agony of a protracted trial had admitted their guilt before Trial Court and had thrown themselves at its mercy and consequently they deserved to be dealt with in a correspondingly appropriate manner which, in any case, did not call for imposition of maximum sentence for the offence charged. Sentence of six months' R.I. awarded to accused by Sessions Court was reduced to imprisonment already undergone by each of them in circumstances by invoking the provisions of Section 561-A, Cr.P.C. **1997 P Cr. L J 153.**

Conviction for--Challenge to : It is constrained to observe that reliance placed on certificate produced was not in accordance with law as it was not part of evidence on record. Petitioners had admitted their guilt and thrown themselves at mercy of Court. *Held:* Appellants deserved to be dealt with in a correspondingly appropriate manner, which does not call for imposition of maximum sentences. Appeal partly accepted. **P L J 1996 Cr. C. 1035; 1997 P Cr. L J 153.**

290. Punishment for public nuisance in cases not otherwise provided for : Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

COMMENTS

Scope : This section provides for the punishment of acts which constitute public nuisance within the meaning of Section 268 but for which no specific punishment is provided

for in the Code. Thus under Section 283, danger, obstruction of injury must be necessary consequence of the act of the nuisance-feasor. In the absence of evidence of such actual danger, etc., the offence would be punishable under this section.

It is not sufficient proof under the section to say that the complainant and a few, of his tenants represent the people in general who occupy property in the vicinity, there being no other people dwelling within unpleasant range. **P L D 1958 Dacca 425.**

Where the complaint was lodged against the accused alleging that the accused are running a brothel where they offer their daughters for prostitution and allow the visitors to drink and dance within the premises of their houses. This merry-making way of life adopted by the accused was alleged to be of a very great annoyance for the neighbours. It was *held that* proceedings under Section 250 were misconceived, as it did not constitute the offence of public nuisance. **1977 P Cr. L J 576.**

291. Continuance of nuisance after injunction to discontinue: Whoever repeats or continues a public nuisance having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

292. Sale, etc., of obscene books, etc. : Whoever--

- (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
 - (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
 - (c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
 - (d) advertises or makes known by any means whatsoever that any person he engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or
 - (e) offers or attempts to do any act which is an offence under this section,
- shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Exception : This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

COMMENTS

Obscene : The word "obscene" is not defined in the Penal Code. What has to be considered as obscene or indecent has changed from time to time and may not exactly be the same in different countries. The tendency in recent times is not to prohibit sex knowledge to be spread on scientific lines. Works of art are generally not considered as obscene. **1954 Cr. L J 1622.**

"Obscene" means "offensive to chastity or modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be expressed; impure, as obscene language, obscene picture." Anything "expressing or suggesting unchaste and lustful ideas, impure, indecent, lewd. **1953 Cr. L J 763.**

As to what is obscene cannot be determined by opinion of majority of witnesses. Nor is opinion of any particular witness a true test whether or not a particular book is obscene. It is the duty of Court alone to decide on facts of each case whether material in question is or is not obscene. Obscenity or otherwise of a picture/photograph/article, depends upon surrounding circumstances and facts in each and every case. **P L D 1979 Lah. 279.**

If a person chooses to sell and distribute what is obscene, it must be presumed that he intended the natural consequences of his act namely, corruption of the minds and prejudice of the morals of the public. It is not sufficient for him to say that his intention were good. It is his public act that must be the test of his intentions, and having done an unlawful act it is no answer to say that he thought it lawful. **A I R 1917 Lah. 288.**

The question of "obscurity" is not to be determined by the opinion of an artist but rather by reaction of a normal man and by prevailing normal standards and conditions of society. Opinions of majority of witnesses are not a true test. It is the duty of the Court to decide such questions. **P L D 1960 Lah. 172.**

Section 292 and Censorship of Films Act : A complainant cannot be permitted to resort to proceedings under the General Law on the basis of facts which attract the provisions of a Special Law, when prosecution of infringement of the Special Law requires a complaint by a statutory authority, such a course tends to set the provisions provided by special statute at naught. **1975 P Cr. L J 1137.**

Notice for cancellation of Cinema licence : Neither the Censor Board, nor the Licensing Authority or any person authorised by any of them had reported the matter to the police and no Criminal Court, therefore, could take cognizance of the offence under Section 18 (5) of the Motion Pictures Ordinance, 1979. Films taken into possession from the Cinema had not been sent to Censor Board for their opinion and mere opinion of the Police Officer had no legal weight for the attraction of Section 292, P.P.C. Raid on the Cinema was also not conducted in accordance with law. F.I.R. and all the subsequent proceedings in pursuance thereof including the issuance of notice for cancellation of licence were quashed accordingly. **1995 PCr.LJ 1977.**

293. Sale, etc., of obscene objects to young person : Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

294. Obscene acts and songs : Whoever, to the annoyance of others,--

- (a) does any obscene act in any public place, or
- (b) sings, recites or utters any obscene songs, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

COMMENTS

Annoyance: Annoyance to others is essential to constitute an offence under this section. Where there is no evidence that the writing caused annoyance to anybody a conviction under this section cannot be maintained.

It is enough if the obscene act is committed in public and causes annoyance to anybody be he the contemplated victim of the offence or not. **A I R 1953 All. 105.**

When the accused addressed two respectable girls not known to him openly in the hearing of others, in a public place, inviting them to accompany him on his rickshaw in amorous words suggestive of illicit sex relations with them, the accused was convicted under this section. **A I R 1963 All. 205.**

Object : This section punishes for obscene acts and songs, done or recited in any public place to the annoyance of others.

Words "I love you my love" addressed to a girl on a public road when she had come out of her college were held not to be obscene. The accused, however, could be charged under Section 509, P.P.C. **P L D 1955 Sind 261.**

Offence of Zina (Enforcement of Hudood) Ordinance 1979, S. 18 : Both male and female accused were not staying in any room. Police had itself requested that Section 18 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 be deleted as it was not attracted in the case. Mere presence of two citizens in the back seat of a car, would not attract, in ordinary course, Section 294, P.P.C. Challan filed against accused was dismissed and both were acquitted from charges against them. **1998 M L D 1332.**

[294-A. Keeping lottery office : Whoever keeps any office or place for the purpose of drawing any lottery not being a State lottery or a lottery authorized by the Provincial Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery shall be punished with fine which may extend to one thousand rupees.]

1. Sec. 294-A ins. by the Pakistan Penal Code (Amdt.) Act, XXVII of 1970.

COMMENTS

Object : A lottery stands on the same footing as gambling because both of them are games of chance. The object of this section is to save people from the effects of unauthorised lotteries. The offence under this section consists in the publication of proposals and does not depend on whether the proposals were to be actually carried out or not.

Ingredients : The first part of the section deals with keeping a lottery office. It has two essentials:

Keeping of any office or place for the purpose of drawing any lottery.

The second part of the section deals with the publisher of any proposal regarding a lottery.

Lottery : A lottery is a scheme for distribution of prizes by lot or chance. It is a game of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person purchasing tickets is made wholly dependent upon the drawing or casting of lot. (1868) 1 M H C 484.

Drawing : The meaning of 'drawing' relative to a lottery is that lots should be drawn by some mechanical or human agency involving their chance extraction. Where there is no physical or mechanical drawing to determine the lucky lots which depend on a sort of arithmetical progression based on an original number to be determined merely by the chance death of a bond-holder, there is no drawing within the meaning of the section. (1936) 16 Lah. 51. This view does not appear to be correct. Section 294-A applies to all methods dependent solely on chance whether there be physical drawing or not. P L D 1958 Lah. 887.

Games of skill are not covered by this section thus where the proprietors of a newspaper published therein an advertisement of a competition for money prizes, the terms of which were that each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected, the initial letter of each word in the sentence to be a letter occurring in the selected word, that all the sentences reaching the editor of the newspaper would receive careful consideration, and that the decision of the editor as to the prize winners should be final, it was *held that* as the competition was one involving some degrees of skill in the part of the competitors, and as there was no evidence that the number of competitors was no large as to make it impossible for the sentences to be considered on their merits the competition was not one the result of which depended entirely on chance, and that it was, therefore, not a lottery. (1914) 2 KB 868.

[294-B. Offering of prize in connection with trade, etc. : Whoever offers, or undertakes to offer, in connection with any trade or business or sale of any commodity, any prize, reward or other similar consideration, by whatever name called, whether in money or kind, against any coupon, ticket, number or figure, or by any other device, as an inducement or encouragement to trade or business or to the buying of any commodity, or for the purpose of advertisement or popularising any commodity, and whoever publishes any such offer, shall be punishable with imprisonment of either description for a term which may extend to six months, or with fine, or with both.]

1. Sec 294-B ins. by Pakistan Penal Code (Amendment) Act, XX of 1965.

OF OFFENCES RELATING TO RELIGION

295. Injuring or defiling place of worship, with intent to insult the religion of any class : Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section punishes the injuring or defiling of a place of worship with intent to insult the religion of a class of persons. Intention is the gist of the offence under it. Mere defilement of a place of worship is not enough.

This section was intended to prevent wanton insult to the religious notions of a class of persons.

According to the case of *Haq Nawaz v. Province of Punjab*, High Court observed that the sentence for offence under Section 295, P.P.C. being grossly inadequate, deserved to be raised to death or imprisonment for life and fine, likewise the sentence for offence under Section 297, P.P.C. also needed to be suitably increased. **1997 M L D 299.**

Ingredients : This section requires two essentials :--

1. Destruction, damage, or defilement of (a) any place of worship, or (b) any object held sacred by a class of persons.
2. Such destruction, etc., must have been done (i) with the intention of insulting the religion of a class of persons, (ii) with the knowledge that a class of persons is likely to consider such destruction, etc., as an insult to their religion.

'Any class of person' : This expression may include any religious sect however small in number. The application of this section is not limited only as between those who follow different religions. It also applies to different sects or classes of Hindus who are animated by sectarian feelings. **(1885) 1 Weir 253.**

Under this section it must be distinctly proved that there was an intention on the part of the accused to insult the religion of a class of persons. This intention could be ascertained from the nature of the act done. Where there is no intention to wound the religious susceptibilities there will be no offence. Where a person, as the result of a quarrel with a relation, threw a basket containing cooked food (fowl, fish, rice, etc.), into a well but without any intention of wounding the religious susceptibilities of anyone, he has held not to have committed an offence under this section. **Unrep. Cr.C. 979.**

Defiles : The word 'defile' is not to be restricted in meaning to acts that would make an object of worship unclean as a material object, but extends to acts done in relation to the object of worship which would render such object ritually impure. The word "defile" should be taken in the sense in which such class of worshippers usually understand it when it applied to a place or an object of worship.

Where an attempt was made to bring into existence a public mosque in a plot in the possession of an agricultural tenant without the permission of the landlord, it was held that the use of a hut situated in that plot as a public mosque without the landlord's permission could not make it a place of worship as contemplated by this section. Section 295 of the Penal Code.

1860 spoke of defiling of any place of worship or any object held sacred by any class. The section did not require investigation into possession or ownership of the land. **P L D 1962 Dacca 487.**

A mosque is a *waqf* and *waqf* means the dedication of property to God, and in order that there should be a creation of a lawful *waqf* the owner of the property should dedicate it in the name of God. Where the land, on which a *tharra* used as a mosque had been built, had not been dedicated for that purpose by its owner, no mosque could be said to have been built and therefore a person who demolishes such a structure cannot be convicted under Section 295 of the Penal Code. **P L D 1960 Lah. 567.**

Constitutional petition : Act of demolition of mosque, without caring for the Injunctions of Islam and sentiments of Muslims, *prima facie*, smacked of *mala fides*. High Court directed the S.H.O. of the area to register a criminal case under Sections 295 and 297, P.P.C. on the written or verbal report of any of the petitioners against all the persons who had either committed or abetted the offences of trespass into or demolition of the mosque with the knowledge that by their wrongful acts religious feelings of the petitioners and other Muslims would be injured. **1997 M L D 299(1).**

Appeal against acquittal : Appellant personally appeared in the Court and made a false statement that his Counsel being ill was not in a position to attend the Court. Appellant had not come to the Court with clean hands and there was no other alternative except to dispose of the appeal for non-prosecution without touching upon its merits, as the Counsel was fully aware of date fixed for hearing of appeal but had deliberately and without reasonable cause remained absent. Appeal was dismissed for non-prosecution accordingly. **1997 P Cr. L J 34.**

1[295-A. Deliberate and malicious acts intended to outrage religious feelings of any class by insulting its religion or religious beliefs : Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to ²[ten] years, or with fine, or with both.]

COMMENTS

Object : The object of framing this section was to prevent wanton insult to the religious notions of that class of persons.

Insult : It means 'dishonour', 'scornful' treatment. The insult may be by words or signs or visible representation or otherwise'.

Malicious : It implies malice. Malice means ill-will. In legal case it means a wrongful act done intentionally without just cause or excuse. Thus malicious intention means an intention which is motivated by ill-will without any just cause or excuse.

Outraging : 'Outrage' means to wrong grossly; 'treat with gross defence or indignity'. Accordingly "outraging the religious feelings" means "treating the religious feelings with gross indignity".

1. Sec. 295-A ins. by the Criminal Law (Amendment) Act, XXV of 1927.

2. Words subs. for "two" by the Criminal Law (Second Amendment) Act, XVI of 1991.

The ingredients of Section 295-A can be satisfied only if it is established that the intention to insult the religions was deliberate and malicious. **P L D 1960 Lah. 629.**

1[295-B. Defiling, etc., of Holy Qur'an : Whoever wilfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life].

COMMENTS

It may be mentioned here that until now there was no law in Pakistan which expressly provided for the punishment of the act of defiling or desecrating a copy of the Holy Qur'an.

"Damages or desecrates" : The word 'damage' connotes an injury or sparing value or usefulness and the word 'desecrate' means deprivation of sacred character. Here in this section these words connote the loss of deprivity of sacred character of the Holy Book in any manner.

Defilement : Disrespect, if wilful, shall be covered by the definition of "defilement" constituting an offence under Section 295-B, P.P.C. **1994 M L D 15.**

Intent of Section 295-B, P.P.C. : Physical respect of the Holy Qur'an and spiritual feelings with its teachings cannot be separated from each other. **1994 M L D 15.**

"Spiritual respect" and "physical respect"—Distinction : Spiritual respect is a matter of understanding of an individual with reference to his knowledge and wisdom which is not common, but to show physical respect and honour to the Holy Qur'an is a legal, religious and moral duty of a person. Spiritual respect and honour is a matter of an individual relating to his thinking whereas physical honour and respect is a matter of his visible action. **1994 M L D 15.**

Inscription of Kalima Tayyaba and other Qur'anic verses on walls of place of worship of Qadianis, would not make out offence under Section 295-B and accused in such case would be entitled to bail. **1997 SD 448.**

Qadianis hold Holy Qur'an and its text in high esteem, relish its recitation, derive spiritual enlightenment and guidance from Qur'anic verses and with that end in view they inscribe or exhibit at their place of worship. *Held :* Such an act would not tantamount to desecration or derogation of Allah's Book or unlawful/wrongful use of Qur'anic verses within meaning of Section 295-B. **1997 S D 448.**

Appeal : Eye-witnesses who apparently had no axe of their own to grind had supported the prosecution story. Prosecution evidence showed that the accused was not mentally abnormal at the time of commission of the crime nor was he in a disturbed condition in any manner whatsoever. Accused had failed to prove that he was suffering from a mental disease at the time of occurrence. Appeal was dismissed in circumstances. **1998 S C M R 1582.**

2[295-C. Use of derogatory remarks, etc., in respect of the Holy Prophet : Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be

1. Sec. 295-B added by P.P.C. (Amendment) Ordinance, I of 1982.

2. Sec. 295-C ins. by the Criminal Law (Amendment) Act, III of 1986, S. 2.

upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

COMMENTS

Object and scope of Section 295-C, P.P.C. : High Court desired that provision be made more comprehensive so as to make blasphemy *qua* other Prophets, including the Holy Christ, punishable with the sentence of death. **P L D 1994 Lah. 485.**

Anything going in favour of accused must be taken into consideration and the benefit of the same, if any, be extended to him not as a matter of grace but as a matter of right. **1997 M L D 1228.**

Conviction under Section 295-C/34 and 298-A/34, P.P.C. can be based on the solitary statement of a witness if the Court finds his evidence to be trustworthy, inspiring confidence and in consonance with the circumstances of that particular case. **1995 P Cr. L J 811.**

Defile : Word "defile" occurring in Section 295-C, P.P.C. means to corrupt purity or perfection of; to debase; to make ceremonially unclean; to pollute; to sully; to violate the sacredness or sanctity of; to desecrate, profane; to sully the honour of, and to dishonour. **P L D 1994 Lah. 485(1).**

First Information Report.--Evidentiary value : First Information Report is not a substantive piece of evidence and can only be used as corroboration or contradiction of the complainant's statement which he makes before the Court on oath. **1995 P Cr. L J 811.**

Delay in lodging of F.I.R.--Effect : Where the case did not involve any circumstantial evidence or recovery and depended upon ocular testimony furnished by the complainant and three eye-witnesses, delay in reporting the matter to the Police was not sufficient to doubt the prosecution case. **P L D 1994 Lah. 485.**

Appreciation of evidence : Eye-witnesses had contradicted each other on the material point of the recovery of the incriminating material (photograph) from the possession of accused and such material contradiction being totally irreconcilable had shattered the veracity of the ocular testimony. Complainant's version as well as the version contained in the Murasila had also been contradicted by other prosecution witness. Prosecution had failed to produce the best evidence as the most important witness regarding the recovery of the alleged photograph from the accused had been withheld without any rhyme or reason which led to the presumption that in case he was produced he could not have supported the prosecution case. Possibility of the accused having been implicated in the case with some ulterior motive also could not be ruled out. Accused were acquitted in circumstances. **1997 M L D 1128.**

Charge against accused under Section 295-C : Sessions Court admitting accused to bail. High Court cancelling the bail. Supreme Court converting leave petition into appeal and admitting accused to bail for reasons: *firstly*, charge had been levelled by a subordinate against superior working in the same office or establishment though F.I.R. was lodged by an intermediary, *secondly* delay of ten days had taken place in lodging F.I.R., *thirdly*, oral conversions had been made subject-matter of charge, the content, context and effect of which would require proof and understanding at trial, and *lastly*, there was also an indication that petitioner had at some stage acted in a disciplinary matter as an Inquiry Officer against original complainant. **1997 S D 442.**

296. Disturbing religious assembly : Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship, or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENTS

Object : The object of this section is to secure protection from molestation when people congregate for worship and it provides punishment in those who voluntarily cause disturbance to any congregation lawfully engaged in discharging their duties imposed upon them by the religion.

Disturbing religious assembly : Assemblies held for a religious worship, or for the performance of religious ceremonies, are hereby protected from intentional disturbance.

Ingredients : The section has the following essentials :--

1. Causing of disturbance voluntarily.
2. The disturbance must be caused to an assembly lawfully engaged in religious worship or religious ceremonies.

297. Trespassing on burial places, etc. : Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby,

commits any trespass in any place of worship or on any place of sculpture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse or causes disturbance to any persons assembled for the performance of funeral ceremonies,

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENTS

Object : The section deals more especially with trespasses on places of sculpture and places set apart for the performance of funeral rites and as depositories for the remains of the dead. It extends the principle laid down in Section 295 to places which are treated as sacred.

Feelings : The section refers to "feelings" but not to "religious feelings". The kind of "feelings" which comes within the section is clearly limited in its nature by the second paragraph to the section by reference to a place of worship, to a place of sculpture to feelings of a spiritual rather than a material nature, feelings associated with such sacred places. It does not punish acts which are merely of earthly vanity or pride. Section 298 expressly refers to "religious feelings". **A I R 1941 Kar. 316.**

Accused according to his own admission, carried dead body of deceased in his truck and threw it on road side with knowledge that he was thereby offering indignity to human corpse and injuring feelings of relations of deceased. It was *held that* one of ingredients of offence under Section 297 stood proved on record on the basis of accused's own admission. **1980 SCMR 391.**

298. Uttering words, etc., with deliberate intent to wound religious feelings : Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine, or with both.

COMMENTS

Scope : This section is much wider than Section 295 and includes any action which is known to wound the religious feelings of others.

Object : The object of this section is to permit liberties to hold religious discussions and simultaneously it prevent the interference from any person professing any religion from offering, under the pulse of such discussion, intentional insult to what is held sacred by others.

6 C P I R (Cr.) 7.
'Deliberate intention of wounding the religious feelings' : The Law Commissioners observe: The intention to wound must be deliberate, that is, not conceived on the sudden in the course of discussion, but premeditated; it must appear, not only that the party, being engaged in a discussion with another on the subject of the religion professed by that other, in the course of the argument consciously used words likely to wound his religious feelings, but that he entered into the discussion with the deliberate purpose of so offending him.

1[298-A. Use of derogatory remarks, etc., in respect of holy personages : Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (*Ummul Mumineen*), or members of the family (*Ahle-bait*), of the Holy Prophet (peace be upon him), or any of the righteous Caliphs (*Khulafa-e-Rashideen*) or companions (*Sahaaba*) of the Holy Prophet (peace be upon him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both].

COMMENTS

Essentials of Section 298-A : According to the case of *Abdul Qadeer v. State*, Section 298-A, Penal Code deals with the use of derogatory remarks, etc. in respect of Holy Personages, i.e., the Sacred name(s) of any wife (*Ummul Mumineen*) or members of the family (*Ahle-Bait*) of the Holy Prophet (p.b.u.h.) or any of the righteous Caliphs (*Khulafa-e-Rashideen*) or companions (*Sahaba*) of the Holy Prophet (p.b.u.h.). Thus, the recitals of the complaint have to be considered by the Court at the time of the formulation of the charge in the complaint (F.I.R.) there is rather no mention about the Personages narrated in Section 298-A. Penal Code in the complaint the allegation is about the use of derogatory remarks in respect of the Holy Prophet Muhammad (p.b.u.h.) and the opinion expressed by the learned Additional Sessions Judge in his order dated 15-7-1977 is held to be legal, valid and operative who has to hold the trial keeping in view column 8 to Sched. II of the Code of Criminal Procedure. **1997 Law Notes (Lah.) 853; K L R 1997 Cr.C. 749; 1997 P Cr. L J 189.**

Accused Qadiani facing charge under Sections 298-A and 295-C for having uttered derogatory words in respect of relationship between Hazrat Zainab and Holy Prophet Muhammad (p.b.u.h.) would be entitled to bail when charge was based on oral conversation between accused and complainant and admittedly complainant was always inimical to accused. High Court admitting accused in present case to bail with observation that merely belonging to a particular faith is no offence under the law of land. **1997 S D 445.**

The honour and respect of the family of the Holy Prophet or any of the righteous Caliphs or Companions of the Holy Prophet, is intended to be protected and whoever defiles by words either spoken or written or by visible representation or by any imputation, innuendo or insuation is to be punished under this section.

Quashing of proceedings : Magistrate tried the accused under Section 298-A, P.P.C., but before announcement of judgment on having found the accused, *prima facie*, liable under

1. Sec. 298-A added by Pakistan Penal Code (Second Amendment) Ordinance, XLIV of 1980.

S. 295-C, P.P.C. triable by Sessions Court, sent the case to Sessions Court as contemplated under Ss. 190(3) & 347, Cr.P.C. Sessions Court being satisfied with the *prima facie* attraction of Section 295-C, P.P.C. continued with the case. Validity. Complaint to be considered by the Court at the time of formulation of charge did not mention the personages narrated in Section 298-A, P.P.C. but contained an allegation about the use of derogatory remarks in respect of the Holy Prophet Muhammad (p.b.u.h.). Magistrate, therefore, keeping in view the procedural law had no alternative but to send the case to Sessions Court for trial. Opinion expressed by Sessions Court regarding the *prima facie* attraction of Section 295-C, P.P.C. was also valid. Accused were, *prima facie*, liable under Section 295-C, P.P.C. which was triable by Court of Session. 1998 PCr.LJ 189.

¹[298-B. Misuse of epithets, descriptions and titles, etc., reserved for certain holy personages or places : (1) Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name) who by words, either spoken or written, or by visible representation,--

(a) refers to or addresses, any person, other than a Caliph or companion of the Holy Prophet Muhammad (peace be upon him), as "*Ameer-ul-Mumineen*", "*Khalifatul-Mumineen*", "*Khalifa-tul-Muslimeen*", "*Sahaabi*" or "*Razi Allah Anho*";

(b) refers to, or addresses, any person, other than a wife of the Holy Prophet Muhammad (peace be upon him), as "*Ummul-Mumineen*";

(c) refers to, or addresses, any person, other than a member of the family "*Ahle-bait*" of the Holy Prophet Muhammad (peace be upon him), as "*Ahle-bait*"; or

(d) refers to, or names, or calls, his place of worship as "*Masjid*";

shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(2) Any person of the Qadiani group or Lahori group (who call themselves "Ahmadis" or by any other name) who by words, either spoken or written, or by visible representation, refers to the mode or form of call to prayers followed by his faith as "*Azan*", or recites *Azan* as used by the Muslims, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine].

²[298-C. Person of Qadiani group, etc., calling himself a Muslim or preaching or propagating his faith : Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who, directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine].

1. Sec. 298-B ins. by Anti-Islamic Activities of Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, XX of 1984.

2. Sec. 298-C. ins. by the Anti-Islamic Activities of Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, XX of 1984.

OF OFFENCES AFFECTING THE HUMAN BODY

In the Pakistan Penal Code as well as the Ordinance the offences affecting human body are divided in two classes:

- (1) offences affecting life;
- (2) offences relating to injuries to body of a person.

1. Culpable homicide either amounts to murder as defined in repealed Section 300, P.P.C. and punishable under Section 302, P.P.C. or does not amount to murder as defined in exceptions of Section 303, P.P.C. and punishable under Section 304, P.P.C. in the Ordinance culpable homicide (Qatl) has been classed in two groups :

- (1) Culpable homicide which amounts to murder, *i.e.*, Qatl-i-Amd is defined in substituted Section 300, P.P.C. This definition is similar to the definition of murder in the repealed Section 300, P.P.C. There is, however, material difference in the punishments provided in two enactments. In Section 302, P.P.C. the offender is liable to sentence of death or imprisonment for life and fine. In the substituted Section 302, P.P.C. punishments provided are Qisas (if proof under Article 17 of the Qanun-e-Shahadat is available) or death or imprisonment for life as Tazir or with imprisonment of either description for a term which may extend to 25 years where the Qisas is not applicable according to injunctions of Islam. The sentence of fine has been eliminated. There should, therefore, be no difficulty for Courts to administer justice in accordance with the provisions of the Ordinance. If Qatl-i-Amd is not liable to Qisas or it is not enforceable, the offender shall be liable to Diyat. The Court, having regard to the facts and circumstances of the case, may in addition to Diyat, punish the offender with the imprisonment as Tazir under Section 308, P.P.C. which may extend to fourteen years. Similarly, even after waiver or compounding of right of Qisas in a Qatl-i-Amd, the Court may in its discretion, having regard to the facts and circumstances of the case punish, an offender, against whom right of Qisas has been waived or compounded with imprisonment as Tazir which may extend to 14 years. The idea behind this provision is the philosophy that there are two aspects of every crime. One relates to the Haqooq Allah and second relates to the Haqooq-ul-Ibad. The wali may waive or compound Qisas but still it may be considered necessary to punish an offender keeping in view the nature of crime committed by him. For example an offender recklessly fires in street murdering and injuring some persons.

- (2) The culpable homicide which does not amount to murder, *i.e.*, Qatl-i-Amd is defined in substituted Sections 315, 318 and 321, P.P.C. respectively as Qatl Shibh-i-Amd, Qatl-i-Khata and Qatl-bis-Sabab. These kinds of Qatl do not attract punishment of Qisas. These are punishable with imprisonment as Tazir and Diyat. These definitions do not specifically provide for situations contemplated by the exceptions of repealed Section 300, P.P.C. but are wide enough to include cases which used to be punished under Part I and Part II of repealed Section 304, P.P.C. and Section 304-A, P.P.C.

In Qatl Shibh-i-Amd, the intention to cause harm to body is necessary. It means that whoever intentionally causes harm to the body or mind of any person which results in death of

that or any other person by an act or weapon which in the ordinary course of nature is not likely to cause death is said to commit Qatl Shihb-i-Amd. In Qatl-i-Khata intention to cause death or harm is not required as used to be the case in repealed Section 804-II and Section 304-A, P.P.C. Two situations are contemplated in Qatl-i-Khata, one: that death is caused by mistake of act; two: that death is caused by mistake of fact, including rash or negligent act, and also rash or negligent driving. Qatl Shihb-i-Amd and Qatl-i-Khata are liable to punishment of imprisonment and Diyat. The Qatl-bis-Sabab is punishable with diyat only. In Qatl-bis-Sabab, intention is missing. The essential ingredient is doing of an unlawful act, resulting in unintentional death of or harm to any person.

It will thus be appreciated that Courts will find no problem in deciding cases under various provisions of the Ordinance, nor will there be any difficulty in interpreting various definitions in the Ordinance which are comprehensive and more or less identical with the definitions in repealed provisions.

2. It will be appropriate to examine some miscellaneous offences provided in the Ordinance before dealing with hurt cases :

- (1) **Attempt to commit Qatl-i-Amd (murder)** : The wording of substituted Section 324, P.P.C. is identical with first paragraph of repealed Section 307, P.P.C. except the later part which provided punishment if hurt is actually caused in the attempt. The second para. of Section 307, P.P.C. stands repealed by the Ordinance which means that a convict in jail, if commits an offence of attempt to murder, will not be liable to enhanced punishment.
- (2) Attempt to commit suicide is punishable under substituted Section 325, P.P.C. Its provisions are identical to the provisions of repealed Section 309, P.P.C.
- (3) The definition of Thug provided in substituted Section 326, P.P.C. is identical with definition repealed Section 310, P.P.C., except that the word Qatl instead of murder has been used in its last line. The punishment for a Thug is provided in substituted Section 327, P.P.C. which is identical with repealed Section 311, P.P.C.
- (4) The wording of substituted Section 328, P.P.C. and repealed Section 317, P.P.C. regarding exposure and abandonment of child are identical except that in the explanation instead of the word murder, three kinds of Qatl have been incorporated.
- (5) The provisions of substituted Section 329, P.P.C. regarding concealment of birth by secret disposal of dead body are identical with provisions of repealed Section 318, P.P.C.
- (6) The provisions of substituted and repealed Section 301, P.P.C. are in substance identical.
- (7) The Ordinance defines "Ikrah-e-tam" (**اكره تام**) which means putting any person, his spouse, or any of his blood relations within the prohibited degree of marriage in fear of instant death, or instant permanent impairing of any organ of body or instant fear of being subjected to sodomy or Zina-bil-Jabr. "Ikrah-e-naqis" (**اكره ناقص**) means any form of duress which does not amount to Ikrah-e-Tam. The two definitions read together are very wide. These do not state the reasons or object of duress. A Qatl committed in the circumstances of Ikrah-e-Tam or Ikrah-e-Naqis has been made punishable under substituted Section 303, P.P.C. This is a new provision

of law. Ikrah-e-Tam or ikrah-e-Naqis involve two persons, *firstly*, the person who causes Ikrah-e-Tam or Ikrah-e-Naqis, *i.e.*, puts another person under duress, *secondly*, who is subjected to duress, *i.e.*, Ikrah-e-Tam or Ikrah-e-Naqis. Both of them, *i.e.*, person committing Qatl under Ikrah-e-Tam or Ikrah-e-Naqis and the person causing Ikrah-e-Tam and Ikrah-e-Naqis seem to have been made liable to punishment under Section 303, P.P.C. The Court will, therefore, be under onerous duty to determine the precise nature of offence committed by each of them.

- (8) Qatl-e-Khata (death) by rash or negligent driving has for the first time been made punishable in substituted Section 320, P.P.C. and Qatl-e-Khata by rash or negligent act has been made punishable in substituted Section 319, P.P.C. These both were earlier punishable under Section 304-A, P.P.C.

3. Hurt : In the repealed provisions, simple hurt is defined in Section 319, P.P.C. as "bodily pain, disease or infirmity" to any person. The repealed Section 320, P.P.C. defines grievous hurt as: *Firstly*, Emasculation; *Secondly*, permanent privation of sight of either eye; *Thirdly*, permanent privation of hearing of either ear; *Fourthly*, privation of any member or joint; *Fifthly*, destruction or permanent impairing of the power of any member or joint; *Sixthly*, permanent disfigurement of head or face; *Seventhly*, fracture or dislocation of a bone or tooth; and *Eighthly*, any hurt which endangers life or which causes the sufferer to be, during the space of twenty days, in severe bodily pain or unable to follow his ordinary pursuits.

A close examination of repealed and substituted provisions (Sections 332, 333, 337, 337-B and 337-E) would indicate that there is difference of details only. In the repealed Sections 319 and 320, P.C. the definitions of simple and grievous hurt have been stated in a compact and consolidated form, whereas in the substituted provisions various organs and parts of human body have been separately defined. *Secondly*, there is slight difference in the punishments of imprisonment for hurt in the Ordinance which makes punishments of Arsh/Daman as substantive punishments.

In the Ordinance human body has been divided into various sections:--

- (i) Limbs and organs;
- (ii) Head and face;
- (iii) Trunk;
- (iv) General-remaining human body.

Thus keeping in view various parts of human body, five kinds of hurt have been stated in substituted Section 332 :--

A. (a) Itlaaf-i-Udw (ائلاف عضو).

The word Itlaf means to 'destroy', 'to ruin' and 'decay'. The word Udw means 'limb' or 'organ'. Itlaaf-i-Udw means to dismember, amputate, sever any limb or organ of body. This definition corresponds with the provisions of clauses *fourthly* and *fifthly*, of repealed Section 320, P.P.C.

(b) Itlaf-i-Salahiyyat-i-Udw (ائلاف صلاحيت) means destroying or permanently impairing the functioning power or capacity of a person or causing permanent disfigurement of some organ.

General : Itlaaf-i-Udw and Itlaaf-i-Salahiyyat-i-Udw, respectively, are defined in substituted Sections 33, P.P.C. and 335, P.P.C. and made punishable under Section 334 and Section 386, P.P.C. These sections provide three kinds of punishments:

(i) **Qisas** : As stated above, the basic principle of Qisas is "equality" or in common man's language "similarity". If Qisas is not executable keeping in view the principles of equality it will not be exacted. Suppose an offender inflicts single blow with sword resulting in amputation/dismemberment of one-fourth of left forearm. The punishment of Qisas will thus be executable only if the authorised medical officer gives an opinion that similar result could possibly be achieved without any additional damage to the offender. The person causing such damage will be liable to action. In practice, therefore, it may rather be difficult for any medical officer to opine that Qisas in a particular case was executable keeping in view the principles of equality. The Court will, therefore, in each case of hurt involving punishment of Qisas, require the authorised medical officer, appearing as witness to the case, to give opinion "whether Qisas will be executable keeping in view principles of equality". The punishment of Qisas shall under Section 337-P, P.P.C. be executed (a) in public, (b) by an authorised medical officer; and (c) in presence of victim or, if the victim dies before the execution of the Qisas, in the presence of the wali of victim.

(ii) The second punishment provided in Sections 334, P.P.C. and 336, P.P.C. of Arsh. The word 'shall' has been used for this punishment. This means that if Qisas is not found executable, the offender shall be punished with Arsh. The Court will have no discretion to decline this punishment. The value of Arsh for various kinds of hurt is given in Sections 337-Q to 337-W. These are self-explanatory sections and require no discussion. However, one point need be mentioned that in working out percentage of the value of Diyat to determine the value of Arsh the minimum value of Diyat fixed by the Federal Government on First day of July each year will be taken in consideration. Arsh is a compensation which is recoverable even from the estate of offender if he dies before payment. The Court will be required to record a direction in the judgment under Section 337-X, P.P.C. that the offender shall be kept in jail until Arsh is paid. This will be simple imprisonment without fixing of time limit. It will be of the kind of civil imprisonment. The Court may on application by an offender order his release on the bail if he furnishes security equal to the amount of the Arsh to the satisfaction of the Court for payment of the Arsh. The Court may also order payment of the Arsh in the instalments spreading over a period of three years from the date of the judgment.

(iii) Imprisonment as Tazir is the third punishment provided in Sections 334 and 336, P.P.C. The words "may also" have been used for this punishment. This means that the Court, for offences of Itlaaf, may or may not award punishment of imprisonment. This is discretion whereas the punishment of Arsh is mandatory.

(b) **Shajjah** : It is an Arabic word which means injuries on head or face. These injuries are defined in substituted Section 337, P.P.C. The parallel provisions can be seen in Clause Sixthly of repealed Section 320, P.P.C. The difference between two provisions is that the repealed clause makes mention of "permanent disfiguration of head or face" and the substituted Section 337 specifies various kinds of Shajjah, i.e., injuries on the head or face of a person, given as follows :--

- (a) Shajjah-i-Khafifah (**شجه خفيفة**) means simple hurt by any weapon, on head or face without exposing bone of the victim.
- (b) Shajjah-i-Mudliha (**شجه موضحة**) means simple hurt by any weapon on head or face where though bone is exposed but no fracture is caused.
- (c) Shajjah-i-Hashimah (**شجه هاشمة**) is grievous hurt by any weapon on head or face, resulting in fracture of bone of victim and without dislocating it.
- (d) Shajjah-i-Mana'illah (**شجه منعقة**) is grievous hurt, by any weapon, on head or face, resulting in fracture and dislocation of bone of victim.

- (e) Shajjah-i-Ammah (**شججه آمه**) is grievous hurt by any weapon, causing fracture of the skull of the victim, where the wound touches the membrane of the brain.
- (f) Shajjah-i-Damighah (**شججه داميه**) is grievous hurt by any weapon, causing fracture of the skull of the victim, so that the wound touches the membrane of the brain.

These six kinds of injuries on head or face previously punishable under repealed Sections 323, 324, 325 and 326, P.P.C. are now punishable under substituted Section 337-A, P.P.C. Only Shujjah-i-Mudihah is punishable with Qisas or in alternate with Arsh and imprisonment. Shajjah-i-Khafifah is punishable with Daman and may also be punished with imprisonment. The value of Daman is not fixed in the Ordinance. It is to be fixed by Court in its discretion. The remaining kinds of Shajja are punishable with Arsh and may also be punished with imprisonment as Tazir. As stated earlier, the punishment of Arsh is basic and mandatory whereas the punishment of Tazir is discretionary.

(c) Jarh (**جرح**) : The word Jurh is derived from the word Jarooah which means injury (**جرح**). The word Jurh is used for injuries on human body other than injuries on head or face. These injuries primarily on trunk of human body are of two kinds :--

(1) Jaifah (**جائفه**) (2) Ghayr Jaifah (**غير جائفه**) Jaifah means injury which extends in the body cavity of the trunk. Ghayr Jaifah means injury which does not amount to Jaifah. There are six kinds of ghayr Jaifah Jarh :--

- (i) Damiyah (**داميه**) means injury with any weapon, on any part of body, except head or face in which skin is ruptured and bleeding occurs.
- (ii) Badiyah (**باضعه**) means injury with any weapon, on any part of body except head or face, by cutting or incising the flesh without exposing the bone.
- (iii) Mutalahimah (**متلاحمه**) means injury with any weapon on any part of body except head or face by lacerating the flesh.
- (iv) Mudihah (**موضعه**) means injury with any weapon, on any part of body, except head or face in which bone is exposed.
- (v) Hashimah (**هاشمه**) means injury with any weapon, on any part of body, except head or face resulting in fracture of a bone without dislocating it.
- (vi) Munaqqilah (**منعقله**) means injury with any weapon on any part of body except head or face resulting in fracture and dislocation of bone.

Punishment for Jaifah is provided in substituted Section 337-D, P.P.C. and punishment for Ghayr Jaifah is provided in Section 337-F, P.P.C. The basic punishment for Jaifah is Arsh and the offender may also be awarded imprisonment as Tazir, Jaifah is a grievous injury whereas some Ghayr Jaifah are grievous and some simple hurt. All Ghayr Jaifah hurts are punishable with Daman and the offender may also be awarded imprisonment as Tazir:--

(d) Other kinds of offences including hurt:--

- (1) Hurt by rash or negligent driving previously punishable under Sections 337 and 338, P.P.C. is now punishable under substituted Section 337-G.
- (2) Hurt by rash or negligent act other than driving previously punishable under Sections 337 and 338, P.P.C. is now punishable under substituted Section 337-H, P.P.C.

- (3) Hurt caused by mistake is punishable under Section 337-I.
- (4) Hurt by means of poison previously punishable under Sections 327, 329, 330 and 331, P.P.C. is now punishable under substituted Section 337-J, P.P.C.
- (5) Hurt not mentioned hereinbefore which endangers life or which causes the sufferer to remain in severe bodily pain for 20 days or more or renders him unable to follow his ordinary pursuits for 20 days or more is now punishable with Dhaman and imprisonment under substituted Sections 337-K and 337-L. This kind of hurt was previously defined in clause Eighthly of Section 320, P.P.C.
- (6) Under the provisions of P.P.C. mere rash or negligent driving is punishable under Section 279, P.P.C. There is in P.P.C. no specific provisions to make death or hurt by rash or negligent driving punishable. It is for the first time in the Ordinance that death by rash or negligent driving has been made punishable, under substituted Section 320, P.P.C. Similarly hurt caused by rash or negligent driving has specifically been made culpable for the first time in Section 337-G of the Ordinance.

It will be appreciated that in most of hurt cases intention and knowledge are necessary ingredients of offences. *Secondly*, the principle of enforcement of Qisas is same in all hurt cases. *Thirdly*, in awarding punishment emphasis is on compensation in the shape of Arsh or Daman which has been made mandatory punishment leaving no discretion with the Court whereas punishment of imprisonment is discretionary. *Fourthly*, specific procedure has been provided to ensure recovery of compensation of every kind under the Ordinance. However, nothing is said about situation if the offender has no property to discharge the said liability, and *Fifthly*, the value of Arsh for various organs has been fixed in Sections 337-Q to 337-W all offences of hurt may be waived or compounded. The word Qisas has not been used in Section 338-E, instead the word offence has been used. This means that offences may be waived or compounded irrespective of punishment provided for the offence. Article 'Law on Qisas and Diyat and its Application' by Mr. Justice (Retd.) Mian Qur'an Sadiq Ikram.

1. The relevant Aayats of Quran-ul-Hakim regarding Qisas and Diyat are as follows :--

- (i) Surah Albaqrah-Aayats 178, 179 and 194.
- (ii) Surah Alnisa-Aayats 29, 92 and 93.
- (iii) Surah Almaaidah-Aayats 32, 33 and 45.
- (iv) Surah Alinam-Aayat 151.
- (v) Surah Bani Israel-Aayats 31 and 32.
- (vi) Surah Alfurqan-Aayat 68.

2. Qisas is executing of the same punishment keeping in view principle of equality and similarity. Diyat is compensation for human life. Arsh is compensation for organs and parts of body. Wali means legal representative of victim.

The Ordinance provides with all details. Its provisions are simple and are to be applied under existing procedural law. In its enforcement Courts or lawyers should not enter in negligible differences between various schools of thought. The difference is not on basic principles but on minor details.

3. On "The Day of Judgment" Allah the Most Merciful, the Most Beneficent will first of all undertake accountability of Qatl. The Qatil and all those instigating, abetting, assisting or joining a Qatil will be equally accountable. Excepting for (i) death in Qisas, (ii) Qatl of an adulterer and (iii) Qatl of Murtid, the Qatl of a Muslim is completely prohibited. The Qatil cannot inherit property of victim.

4. The value of Diyat is not fixed in Holy Qur'an. It is said that Hazrat Umar Farooq enhanced value of Diyat fixed during the life-time of Holy Prophet (PBUH). The value of Diyat is not static. In case the Qatil is not known the Diyat according to Sunnah, is to be paid by the State. It is not so provided in the Ordinance.

5. Every crime involves either Haqooq Allah or Haqooq-ul-Ibad or both. Islamic Jurisprudence classifies crime in three categories :--

I. (1) Haddood.

(2) Qisas and Diyat.

II. (3) Ta'zir.

The crimes against the injunctions of Qur'an are part of Hudood. The punishments are prescribed in Qur'an. The predominant ingredient of Hudood is violation of Haqooq Allah. As for example the offence of theft, robbery, dacoity, illegal sexual intercourse, qazf, etc. To exact and enforce Hadd is right of Allah. State or individual cannot interfere or change punishments provided for Hadd in Qur'an. These are offences against society and disturb peace and public tranquility.

The offences relating to Qisas and Diyat are offences against individuals affecting human body and Haqooq-ul-Ibad. The Holy Qur'an, therefore, gives right to victim or his Wali to exact Qisas or claim Diyat.

The offenders of theft, robbery, dacoity, zina, qazf, treason cannot be pardoned or compromised. The offence of Qatl or hurt may be compromised.

6. The punishment for offences involving Hadd or Qisas can be awarded only if the offence is proved on the basis of evidence of specified quality. The punishment of Qisas can be executed only by State and not by victim or his Wali keeping in view the principle of equality.

Diyat is enforceable in cases of Qatl-e-Shibah Amd, Qatl-i-Khata, Qatl-bis-Sabab and hurt cases.

7. The appreciation of evidence in cases involving Hadd or Qisas will have to be done keeping in view the specified qualities. In cases other than Hadd or Qisas, the present mode and principles of appreciation of evidence will be followed. The evidence may consist of voluntary confession, eye-witnesses account or circumstantial evidence.

8. Qisas and Diyat will be right of Wali of victim or the victim. Wali means the person entitled to inherit the estate of victim.

9. The parties may enter in compromise, i.e., Sulh on mutually agreed terms. The consideration for compromise can be agreed to be payable immediately or at some future time.

Of offences Affecting Life

1[299. Definitions : In this Chapter, unless there is anything repugnant in the subject or context,--

- (a) "adult" means a person who has attained the age of eighteen years ;
- (b) "arsh" (ارش) means the compensation specified in this Chapter to be paid to the victim or his heirs under this Chapter ;
- (c) "authorised medical officer" means a medical officer or a Medical board, howsoever designated, authorised by the Provincial Government ;
- (d) "daman" (ضمان) means the compensation determined by the Court to be paid by the offender to the victim for causing hurt not liable to arsh (ارش) ;
- (e) "diyat" (دیت) means the compensation specified in Section 323 payable to the heirs of the victim ;
- (f) "Government" means the Provincial Government;
- (g) "ikrah-e-tam" (اکراه تام) means putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death or instant permanent impairing of any organ of the body or instant fear of being subjected to sodomy or zina-bil-jabr ;
- (h) "ikrah-e-naqis" (اکراه ناقص) means any form of duress which does not amount to ikrah-i-tam;
- (i) "minor" means a person who is not an adult ;
- (j) "qatl" (قتل) means causing death of a person ;
- (k) "qisas" (قصاص) means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd in exercise of the right of the victim or a wali ;
- (l) "ta'zir" (تعزیر) means punishment other than qisas (قصاص), diyat (دیت), arsh (ارش), or daman (ضمان); and
- (m) "wali" (ولی) means a person entitled to claim qisas.

1. Sections 299 to 338-H subs. by the Criminal Law (Amendment) Act, II of 1997.

COMMENTS

Clause (a)—Adult : "Adult" means a person who has completed 18 years of age and in the case of female a person who has either attained the age of 16 years or has attained puberty. Puberty is presumed in the absence of evidence on completion of the age of 15 years, but it may be attained earlier.

According to the Majority Act, 1875, every person domiciled in Pakistan should be deemed to have attained his majority when he shall have completed his age of 18 years and not before. In case of minor of whose person or property or both a guardian has been appointed before the minor has attained the age of 18 years and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before.

Puberty : The word "puberty" has not been defined in the Ordinance and in order to understand the age of puberty in Islam, one has to refer book to the Muslim Law on the point. According to Imam Abu Hanifa and Muhammad, puberty is presumed to be attained at the age of 15 years both for males and females. There are conflicting reports about the view of Abu Hanifa. According to one report, he has also agreed with the view of the disciples. Imam Al-Shafei has also agreed with it. This has also been held in a number of cases. **P L D 1970 S C 323.**

According to Hedaya puberty is as under :

The puberty of boy is established by circumstances, or upon his attaining eighteen years of age, and that of a girl, by circumstances, or upon her attaining seventeen years of age.

W.H. Mecnaghten, in his Principles and Precedent of Muhammadan Law, at page 266, has raised a question regarding the validity of marriage of a girl of 11 years of age of her own free-will and choice, without the consent and approbation of her mother or guardian and then has answered as follows :--

"The answer to the question entirely depends on the fact of the girl's being adult or otherwise. If a girl exhibits certain signs of womanhood at the age of nine, ten, eleven or up to fourteen years old, she is, in the language of the Law denominated *baligha bilulamut* or adult by puberty. Should she exhibit none of those sign up to her fourteenth year, yet, on her attaining the age of fifteen years, she will be deemed an adult, and in the language or the Law will be termed *baligha bissin* or adult by majority. Under these circumstances if the girl alluded to the question, being eleven years of age, should have shown signs of womanhood, she will be technically denominated *baligha bilulumut* and will be at liberty to contract marriage with a person either her equal or inferior in condition, without the consent of her mother or other guardian. Such marriage is available in law; in other words the contract does not infringe any positive legal rule. The mother or other guardian is not authorised to prevent the match, if she enters into a contract of marriage with a person equal in point of condition; but, if he be her inferior, they have a right to come forward and cause it to be *set aside*. In case of any doubt existing as to whether a girl has exhibited certain signs of womanhood, she should be questioned as to the fact; and if she applies in the affirmative, she should be treated as an adult, otherwise as a minor; and, if the fact cannot be ascertained from her declaration, she should be considered as not having passed the age of minority, and in both the last mentioned cases, if, without the consent and approbation of her mother or other guardian, she should have contracted matrimony either with her equal or her inferior, the marriage is good in law; in other words, the contract does not infringe any positive legal rule; but her mother or other guardian has, at any time, a right to come forward and to cause the marriage to be *set aside*".

The person is adult who has either attained the age as stated in Section 2 (a) or has attained puberty. **1992 P Cr. L J 1058.**

بالغ ہونے کے لیے ہر صورت میں 18 سال کی عمر ضروری نہیں، بلکہ اگر اس سے پہلے علامات بلوغ ظاہر ہو جائیں، تب بھی ایسے فرد کو بالغ کہا جاسکتا ہے (PLD 1991 SC 172)۔
 جمل لڑکے کی طرف سے انزال اور لڑکی کی طرف سے حیض ثابت ہو جائے تو ان کے بالغ ہونے میں کوئی اختلاف نہیں۔ لہذا لڑکے کے بلوغ کی فیصلہ کن شرط انزال، اور لڑکی کی صورت میں اس کے علاوہ حیض یا حاملہ میں سے کوئی علامت پائی جائے تو انہیں بالغ تصور کیا جائے گا (PLD 1991 SC 172)۔

Although accused had not attained the age of 18 years, he would surely be treated as an adult within the meaning of Section 2 (a) of the Ordinance, if he was capable of ejaculating and discharging semen. **1991 P Cr. L J 928.**

The accused who attained puberty was an adult as defined in Section 2 (a) of the Ordinance. Provision of Section 5, Sindh Children Act, 1955 which prescribed that for the purpose of Act, a person shall be deemed to be a child if such person had not attained the age of 16 years would be read subservient to the provisions of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as by virtue of Article 143, Constitution of Pakistan in case of inconsistency between the Federal and Provincial Law, the Federal Law, shall prevail to the extent of repugnancy. **1992 P Cr. L J 1799.**

Clause (b)--Arsh : Arsh is "compensation specified in this Chapter to be paid by the offender to the victim or to his heirs". The use of word victim indicates that Arsh is to be received by the victim himself. If the victim dies before receiving Arsh, it shall be paid to his legal heirs. This means that punishment of Arsh is provided for offences relating to various kinds of hurt. The value of Arsh is fixed and specified in the Ordinance. The value of Arsh will be assessed at certain percentage, indicated in various provisions, of the value of Diyat under Section 323, P.P.C. The Court while working out the percentage of the value of the Diyat will take into consideration the minimum value of Diyat fixed by the Federal Government on the first day of July each year. The Arsh will be payable in *lump sum* or in instalments spreading over three years from the date of final judgment. The Arsh shall be payable within the time specified by Court and the offender may be kept in jail to serve simple imprisonment until the Arsh is paid in full. The Court may release a convict on bail, if he furnishes security equal to the amount of Arsh to the satisfaction of Court for its payment. If the convict dies before payment of Arsh, it shall be recovered from his estate.

Clause (c)--Authorised Medical Officer : Definition of "authorised Medical Officer" in no way curtails the powers of the Courts in directing the examination of the prisoners through the Specialist Doctors looking to the nature of their ailment. **1997 P Cr. L J 1953.**

Order of Trial Court directing production of requisite medical report in Court
Validity : Trial Court itself had not constituted the Medical Board for the examination of accused but had only suggested designations of experts looking at the prayer of accused and had ordered that the seniormost Doctors in such designated fields serving in the Civil Hospital should be the members of the Medical Board, which had actually been constituted by the Secretary Health giving the names of the Doctors and their positions in the related field keeping in view the Court's order. Section 299(c), P.P.C. did not debar the Trial Court from directing the constitution of the Medical Board comprising of designated specialists. Section 94, Cr.P.C. also did not prevent the Trial Court from calling the medical report from the Secretary Health as after formation of the Medical Board its report should have been sent to the Court for examination and it was for the Trial Court itself to see whether the said report was valid or invalid or should be relied upon or not. Order of Trial Court calling for the aforesaid

medical report had neither violated any provision of law nor caused any prejudice to the prosecution which in fact had conceded for calling the same. **1997 P Cr. L J 1953.**

Clause (d)--Daman : The word Daman is actually Dhman. It means compensation payable by the offender to the victim for causing hurt not liable to Arsh, as determined by Court. Daman is ordered for injuries where punishment of Arsh is not available. The value is not fixed or specified in the Ordinance. Its value will be determined, in each case, by the Court keeping in view, *firstly*, expenses incurred on the treatment of victim; *secondly*, loss or disability caused in functioning or power of any organ; and *thirdly*, for the anguish suffered by the victim. The Daman assessed by Court shall be payable to the victim or, if the victim dies, to his heirs according to their respective shares in the inheritance.

In cases of Qatl it will be proper, rather necessary, for prosecution to provide the Court with a list of wali, i.e., legal representatives of the deceased victim, as well as mention financial position of parties for determination of Diyat, Arsh or Daman. The Courts of criminal jurisdiction will not be required to undertake additional proceedings to determine dispute among the heirs. In the case of dispute, the compensation of any form may remain lying in Government treasury with direction to the heirs to have recourse to the Civil Courts. In hurt cases the compensation is to be received by the victim. There will be, therefore, no problem about its disbursement. If, however, the victim dies, then in the case of dispute his legal heirs may be asked to have recourse to the Civil Courts.

Clause (e)--Diyat : Clause (e) of Section 299, P.P.C. defines Diyat as "the compensation specified in Section 323 payable to the heirs of the victim by the offender". In the definition the words "heirs of victim" have been used and not the words "the victim or his heirs". This means that Diyat is a compensation payable only in cases of Qatl, and not in cases of hurt. The offence of Qatl-i-Amd (intentional murder), if proved by evidence as provided in Article 17 of the Qanun-e-Shahadat, is punishable under Section 302, P.P.C. which does not provide for imposition of punishment of Diyat, compensation or fine. The punishment of Diyat is provided where an offender guilty of Qatl-i-Amd is not liable to Qisas or where Qisas is not enforceable. The Court may, however, in certain cases award punishment of imprisonment as Tazir in addition to Diyat. It may be stated that the consideration for compounding of Qisas or for compromise or waiver cannot be classed as Diyat. The said consideration is Badl-e-Sulh and is settled by the parties themselves subject to condition that Badl-e-Sulh shall not be less than the value of Diyat, which means minimum value assessed in substituted Section 323, P.P.C. The offender, in cases of Qatl-e-Shibh-i-Amd and Qatl-i-Khata, shall be liable to be punished with Diyat in addition to imprisonment as Tazir, but in Qatl-bi-Sabab he shall be liable to Diyat only. It will be for the Court to fix value of Diyat in each case, keeping in view the financial position of parties and subject to injunctions of Islam. The minimum value of Diyat will, however, be fixed by the Federal Government on first day of July each year. The Diyat shall be disbursed among the heirs of victim according to their respective shares in inheritance. If, however, an heir forgoes his share, the Diyat to the extent of his share shall not be recovered. The Court may order payment of Diyat in *lump sum* or in instalments spreading over three years for the date of judgment. The convict will not be required to suffer imprisonment in default of payment of Diyat or any part thereof. If he fails to pay Diyat the convict shall be kept in jail to suffer simple imprisonment "until the Diyat is paid in full". The Court may, however, release the convict on bail if he is able to furnish security equivalent to the amount of Diyat to the satisfaction of Court for its payment. This means that the convict will be lodged in jail till full Diyat is paid. The Court will not fix period of imprisonment in default thereof. If the convict dies before payment of Diyat or any part thereof, it shall be recovered from his estate.

Clause (g)--"Ikrah-i-Tam" : Perusal of Section 303(a), P.P.C. with Section 299 (g), P.P.C. highlights three requirements, (i) putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death; or (ii) instant permanent impairing of any organ of the body; or (iii) instant fear of being subjected to sodomy or Zina-bil-Jabr. **P L D 1997 Lah. 110(a).**

Clause (k)--Qisas : Qisas has not been defined in the Ordinance. It means "to copy the other" or "to follow the path followed by the other" or "to act like the act of another". The basic principle of Qisas is similarity. If similarity was not possible or could not be ensured, Qisas may not be enforceable specially in hurt cases. Qisas, in the case of Qatl-i-Amd, is also a punishment of death as is indicated in clause (a) of substituted Section 302, P.P.C. The difference between punishment of Qisas and punishment of death lies in the mode of execution of sentence. The sentence of death will be required to be executed under existing provisions of law on the basis of direction in the judgment of Trial Court that "the offender shall be hanged by neck till he is dead". Similarly, where Court, after trial, comes to conclusion that in the facts and circumstances of a case the punishment of Qisas need be awarded, it will in the judgment specify the mode of execution of Qisas in Qatl-i-Amd. For example if the offender murdered the victim with gun-fire, the Court may record that "the death of offender be caused in execution of Qisas in Qatl-i-Amd of victim by gun-fire till his death under Section 314, P.P.C. in presence of wali". The sentence of death by way of Qisas or Tazir shall be executed after confirmation by the High Court. The Qatl-i-Amd shall not be "Liable to qisas" under Section 306, P.P.C. when the offender is non-pubert or insane; when the offender causes death of his child or grandchild howlowsoever and when wali of victim is direct descendant, howlowsoever, of the offender. The Qisas for Qatl-i-Amd shall "not be enforced" under Section 307, P.P.C. where the offender dies before enforcement of Qisas; when the wali voluntarily and without duress, to the satisfaction of Court, waives the right of Qisas and finally when the right of Qisas devolves on the offender as a result of death of the wali of the victim or on a person who has no right of Qisas against the offender.

In the case of "waiver of right of Qisas" the Court will have to satisfy itself that the waiver by wali was voluntary and without duress. Similar will be the case in compromise and compounding of offences. It may here be observed: *firstly*, that the question of awarding of punishment of Qisas will be determined after trial according to law; *secondly*, the punishment of Qisas will have to be based either on a voluntary and true confession of commission of offences by the accused or on the evidence as provided in Article 17 of the Qanun-e-Shahadat; *thirdly*, right to exact Qisas will accrue after Court awards punishment of Qisas. The punishment of Qisas will not be permissible if the proof of Qatl-i-Amd liable to Qisas is not provided in terms of substituted Section 304, P.P.C. Same will be the case in hurt case.

In the case of Qatl-i-Amd liable to Qisas right to exact Qisas or to waiver Qisas or to compromise/compound will rest with wali of victim which means legal heirs of inheritance. If, however, Government is wali or right of Qisas vests in a minor or insane the Qisas shall not be waived. If there are more than one victim, the waiver of the right of Qisas by the wali of one will not affect the right of Qisas of the other victim. Similarly if there are more than one offenders, the waiver of right of Qisas against one shall not affect right of Qisas against the other offender. Where there is only one wali, the right of Qisas shall vest in him. If there are more than one wali the right of Qisas shall vest in each of them. If the victim has no wali, the Government shall have right of Qisas. In short Qisas in the case of Qatl-i-Amd liable to Qisas means right to claim death of offender for the death of victim and in the case of hurt liable to Qisas means right to claim injury/hurt on the person of offender similar to the injury/hurt suffered by the victim. It also means right to waive or compromise with the offender instead of exacting Qisas. Act stated above the punishment of Qisas would be executed by a functionary of the Government and not by the wali or injured himself.

In this kind of punishment the next-of-kin of the deceased may demand and accept blood-money. Islam allows retaliation and gives the right of pardon to the wronged person and not to the state. The wronged person may also forgive the accused.

Thus the Holy Qur'an enjoins :

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلِ ۚ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنثَىٰ
بِالْأُنثَىٰ ۚ فَمَن عَفَىٰ عَنْهُ مِن أَخِيهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۚ ذَلِكَ تَخْفِيفٌ
مِّن رَّبِّكُمْ وَرَحْمَةٌ ۚ فَمَن اعْتَدَىٰ بَعْدَ ذَلِكَ فَلَهُ عَذَابٌ أَلِيمٌ ۝ وَلَكُمْ فِي الْقِصَاصِ حَيَوةٌ
يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ ۝

(١٤٩-١٤٨ : ٢٢)

[O ye who believe! retaliation is prescribed for you in the matter of the murdered: the free man for the free man and the slave for the slave, and the female for the female. And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord. He who transgresseth after this will have a painful doom. And there is life for you in retaliation, O men of understanding, that ye may ward of (evil)].

When the accused had not been sentenced to death, but to life imprisonment, question of the heirs of the victim compounding their right of Qisas would not arise and such a case would fall under Section 345 (2), Cr.P.C., as amended by the Criminal law (Amendment) Ordinance, 1991. **P L D 1991 S C 202.**

Punishment of "Qisas", applicability : Prosecution case was that female who was previously married to accused, was divorced by him and after divorce, deceased had contracted marriage with her. Accused had specifically denied having divorced his wife and prosecution had failed to bring on record any proof of dissolution of accused's marriage with said lady nor did prosecution produce on record any evidence in the form of Nikahnama etc. establishing marriage of deceased with the said lady. Not possible to believe that accused had in fact divorced the lady in question or that deceased was keeping said lady as his validly married wife. Accused, in circumstances, was not liable to be punished either under Section 302(a), P.P.C. or under Section 302(b), P.P.C., but his case fell within ambit of Section 302(c), P.P.C. according to which punishment of Qisas was not applicable. Accused was convicted under Section 302 (c), P.P.C. and sentence of death awarded to him was set aside in circumstances. **1998 PCr.LJ 1072 (b).**

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Clause (1)--Tazir : It means punishment other than Qisas, Diyat, Arsh and include punishment of imprisonment, Daman, forfeiture of property and fine. It will be awarded for various offences substituted by the Ordinance. The Court will not insist on evidence under Article 17 of the Qanun-e-Shahadat, as proof of offence, to award this punishment. It will be appreciated that in substance the definition of offences in the Ordinance is not at much

variance from the definition of offences in the repealed provisions. As such the existing procedure will continue except the enforcement of Qisas and Diyat, etc.

The Hedaya speaks on the subject thus :

Tazeer, in its primitive sense, means prohibition, and also instruction; in law it signified an infliction undetermined in its degree by the Law, on account of the right either of God, or of the individual; and the occasion of it is any offence for which Hadd (or stated punishment) has not been appointed; whether that offence consist in word or deed.

Chastisement is ordained by the law : Chastisement is ordained by the Law, the institution of it being established on the authority of the Qur'an, where God enjoins men to chastise their wives, for the purpose of correction and amendment; and the same also occurs in the traditions. It is moreover recorded that the Prophet chastised a person who had called another perjured; and all the companions agree concerning this. Reason and analogy moreover both evince that chastisement ought to be inflicted for acts of an offensive nature, in such a manner that men may not become habituated to the commission of such acts; for if they were they might by degrees be led into the perpetration of others more atrocious. It is also written in the "Fatava Timoor-Tashee" of Imam Sirukhsh, that in Tazeer, or chastisement, nothing is fixed or determined, but that the degree of it is left to the discretion of the Kazeer, because the design of it is correction, and the dispositions of men with respect to it are different, some being sufficiently corrected by reprimands, whilst others, more obstinate, require confinement, and even blows.

Ta'zir in its primitive sense, means prohibition and also instruction; in law it signifies an infliction undetermined in its degree by the law, on account of the right either of God, or of the individual, and the occasion of it is any offence for which hadd has not been appointed; whether that offence consists in word or deed.

Ta'zir may be inflicted by imposition of fine, scourging, imprisonment, etc. It is the punishment which is left to the discretion of the *quadi* or judge.

As such Ta'zir is a punishment left to the Ruler of the Head of State in his discretion in a case not covered by Hadd. However, it is not open to a Ruler or the Head of the State to tag on the punishment of Hadd with a further punishment by way of Ta'zir. **P L D 1981 F S C 145.**

The following punishments for crimes other than dealt with as Hudood, are included in Ta'zir. One or more punishments are awarded as deemed proper and necessary by a Qazi, looking to the nature and extent of the crime and its circumstances. The Ta'zir(s) are :

- (1) Slapping.
- (2) Lashing or flogging stripes (not more than 39, i.e., less than the lowest number prescribed as hadd for a slave).
- (3) Externment, Excilement.
- (4) Imprisonment, which in Islamic Law is a coercive measure aiming at producing repentance (Tawbah).
- (5) Public proclamation of the convict on a donkey's back Tashhir.
- (6) Admonition or reprimand.
- (7) Punishment of abandonment.
- (8) Zaman (compensation) payable to the aggrieved person, in case of loss of property.
- (9) Diyat (money compensation).
- (10) Suspension or dismissal, and *lastly*.
- (11) Death penalty.

Flogging--Execution--Mode of :

- (1) The punishment should be administered with a stick without knots.
- (2) The strip should be applied moderately.
- (3) The strip should not be given on the same part but on inflicted different parts of the body.
- (4) The man should be made to stand but in case of a woman should be made to sit.
- (5) Flogging should not inflict wounds on the body beneath the skin.
- (6) The inflicting of punishment should be avoided at the time of intense heat or extensive cold.
- (7) Flogging should be postponed in cases of sick persons. If ailment is such there is no hope of recovery punishment can be awarded.
- (8) In case a woman is pregnant flogging should be postponed till (نفاس) after which penal punishment should be implemented.

(Sahi Muslim, pp. 790-792).

Ta'zir may be inflicted for offences against human life and body, property, public peace and tranquility, decency, moral, religion and so on; in fact the entire criminal law of the Muhammadans (A-siasat ashshara ايات الشرعة) as prevalent at the present-day is based on the principle of Ta'zir.

Provincially Administered Tribal Area : Offences against human body incorporated in Sections 299 to 338, P.P.C. having been declared to be repugnant to Injunctions of Islam and the law relating to Qisas and Diyat enforced in the country having not so far been extended to Malakand Division, the Police and the Courts functioning under the Provincially Administered Tribal Areas should seek guidance from the Law of Qisas and Diyat. **1995 M L D 1210.**

300. Qatl-e-Amd : Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit *qatl-e-amd*.

COMMENTS

Scope : Section 300, P.P.C. (as amended) does not provide any exception in respect of the offence of Qatl-i-Amd if committed due to grave and sudden provocation. **PLD 1995 Quetta 83 (a).**

Essential ingredients : The essential ingredients of the definition of Qatl-i-Amad are :

- (1) causing death of a human being;
- (2) such death must be caused by doing an act;
- (3) with the intention of doing bodily injury to that person;
- (4) the act in the ordinary course of nature is likely to cause death; or
- (5) with the knowledge that the act is so imminently dangerous that it must in all probability cause death.

Two principles were laid down in *Syed Tajammal Hussain v. Nasar Mehdi and another*, **P L D 1976 S C 377**, in order to prove a person as guilty of Qatl-i-Amd. They are :

- (a) accused can come within the mischief of this section only if death is direct result of the injury inflicted by the accused; and
- (b) ingredients of the offence are felonious intention and an injury causing the death.

The accused shall be guilty of Qatl-i-Amd even if by the result of his act intending to cause death of a person, another person, *i.e.*, other than him whose death is intended for, dies. It may not be within his knowledge that death of that other person will be caused by his act.

Determining Factors : Murder is an aggravated form of culpable homicide. The manner of causing the injuries as defined by the prosecution witnesses; the nature of the injuries caused, the part of the body where they were caused; the weapon used by the accused in the commission of the offence; and his conduct are relevant factors in considering whether the offence committed is one of murder of culpable homicide not amounting to murder.

Act done with intention of causing death : This clause says that culpable homicide is murder if the act by which death is caused is done with the intention of causing death. This corresponds with clause (1) of Section 299. Where there is an intention to kill the offence is always murder, unless one of the exceptions to Section 300 applies in which case the offence is reduced to culpable homicide not amounting to murder. Where the accused intended to kill A but instead caused the death of B, he was nevertheless held guilty of murder. **1969 P Cr. L J 973.**

As a basic rule it may be said that when the doer of an act knows that his act will result in death he should be deemed to have intended to cause the death. The law presumes that a man intends the natural and inevitable consequences of his acts.

Where the accused intended to kill A but caused death of B instead, he was nevertheless held guilty of murder. **1969 S C M R 405.**

Causing bodily injury knowing it to be likely to cause death : It is not always essential that there should be an intention on the part of the accused to cause death. It would be sufficient if he had the intention to cause such bodily injury as he knew to be likely to cause the victim's death or if he knew that his act was so imminently dangerous that it must in all probability cause death. This knowledge must be in relation to the person harmed and the offence is murder even if the injury may not generally be fatal but is so only in his special case. Sufficient in the ordinary course of nature implies an injury caused to a normal grown-up human being. When the injury is sufficient to cause the death of a person in a sub-normal state of health, *e.g.*, by reason of age, disease, or weakness, it is spoken of an injury likely to cause death. This is provided in this clause. Thus if a person having knowledge of the peculiar physical condition of the victim causes injury which though not likely to cause death of a normal man is likely to cause death of such person he shall be guilty under the provisions of this clause.

Intentionally causing of injury sufficient to cause death : In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether or not the offender intended causing death and whether or not the offender had a subjective knowledge of the consequence.

Numerous injuries : Where the injuries inflicted are numerous, it is not necessary that each injury or even any one injury should by itself be sufficient in the ordinary course of nature to cause death. If they were cumulative sufficient in the ordinary course of nature to cause the death, the offence would be murder under this clause.

Vital part of body : Ordinarily an injury on a vital part of the body is sufficient to cause death. Where a man inflicts a wound on a vital part and death ensues it is no defence to say that the accused did not intend the injury to be fatal. **P L D 1950 Lah. 90.**

The accused aimed a blow with *vohola* at head of the deceased with sufficient force resulting in his death. The accused, had no intention but to kill and if case not taken out of purview of Section 300, P.P.C. offence established would be one of murder as punishable under Section 302, P.P.C. **P L D 1982 Lah. 26.**

Murder : Evidence of eye-witnesses found reliable though they were close relatives of deceased. Medical evidence fully corroborating evidence of eye-witnesses. F.I.R., lodged with utmost dispatch containing substratum of prosecution case. Evidence of Investigating Officer regarding recovery of pistol corroborated by documents contemporaneously prepared by him. Evidence of Ballistic Expert also corroborating such evidence. Conviction of accused upheld. **K L R 1997 Criminal Cases 743.**

"Imminently dangerous " : This clause deals with cases where an act is done without any intention to kill but with such utter disregard of consequences that there is imputable knowledge that death is an extremely likely contingency. The offence may be unpremeditated and may also have been committed in a sudden quarrel.

This clause also provides for that class of cases where the acts resulting in death are calculated to put the lives of many persons in jeopardy, without being aimed at anyone in particular, and/or perpetrated with a full consciousness of the probable consequence. As for example, where death is caused by firing a loaded gun into a crowd [*vide ill. (d)*], by poisoning a well from which people are accustomed to draw water, by opening the draw of a bridge just as a railway passenger is about to pass over it.

Scope and operation of exceptions : After setting out the four mental conditions the section lays down five exceptions which reduce the offence of murder to culpable homicide not amounting to murder. These Exceptions lay down the circumstances which mitigate the offence of murder. The existence of all the circumstances described in an exception excuses an act which could otherwise be murder within one of the first three clauses, to the extent that the act constitutes only culpable homicide not amounting to murder and not murder. Here the act is *prima facie* murder unless and until an exception is established.

The five exceptions specified in the section may be briefly stated to arise out of:

- (1) Provocation;
- (2) Right of private defence of person and property;
- (3) Exercise of legal powers;
- (4) Absence of premeditation and heat of passion; and
- (5) Consent.

Grave and sudden provocation : The test for the application of the plea of grave and sudden provocation is the effect of provocation on a reasonable man. Under this Exception the provocation (1) must be grave and sudden, and (2) must have, by its gravity and suddenness, deprived the accused of the power of self-control.

Provocation for the purpose of Section 300, P.P.C., must be direct, sudden and grave. **1993 M L D 1391.**

The indulgence which is shown by law in the cases of grave and sudden provocation is a condescension to the frailty of human nature to the *furor brevis*, which while frenzy lasts, renders a man deaf to the voice of reason; so the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents. In recognizing provocation as a mitigation of the crime law respects the infirmities and imbecilities of human nature. **1980 P Cr. L J 357.**

The provocation must be such as would upset not merely a hasty, hot-tempered and hypersensitive person but would upset also a person of ordinary sense and calmness. Law does not take into account abnormal creatures reacting abnormally in given situations. **1988 S C M R 615.**

This section can apply only when the accused is shown to have been deprived of the power of self-control by grave and sudden provocation which is caused by the person whose death is caused. **1992 P Cr. L J 1993.**

Calling someone "Chamoha" not sufficient to deprive him of his power of self-control. The word "Chamcha" which was commonly spoken to indicate loyalty of a person to his superiors could not be regarded as of such a gravity as to deprive him of his power of self-control. **1988 S C M R 615.**

Before benefit of exception could be given, provocation should be grave and sudden and that by its gravity and suddenness offender should be deprived of power of self-control. All this was, however, subject to proviso that offender should not seek it or make it an excuse for killing victim by inciting to provoke him (offender). **1988 S C M R 615.**

The person could not be said to have adequate cause, if consumed by suspicion of illicit intimacy of his wife, he took the life of another, though he could feel that he was justified in doing so. **1991 P Cr. L J 2092.**

The deceased (sister of the accused and her paramour) were having good time in the house of the accused. The accused was a young man of 20 years and so the provocation must be of extreme type. Sentence of five years' R.I. on each count awarded to the accused was reduced to three years' R.I. with the direction that the same should run concurrently under circumstances with the benefit of Section 382-B, Cr.P.C. Sentence of fine being wholly uncalled for was set aside. **1992 PCr.LJ 2453.**

The proposition that nothing short of sexual intercourse and presence of semen marks can evoke the 'Ghairat' of the accused is misconceived. **1990 M L D 1996.**

Occurrences admittedly had taken place in front of the house of accused where the complainant party had no business to be present and such fact by itself had corroborated the accused's version that complainant party had initiated the occurrence by calling his father from his house. Prosecution had failed to produce any independent witness in support of their version. Prosecution witnesses had suppressed the material fact of the accused having received grievous injuries during the occurrence which had been proved on the record. Accused having seen his father in a naked state obviously was likely to get gravely and suddenly provoked to the extent of losing self-control and having been attacked in such a situation by the complainant party as well resulting in grievous hurt to him, accused was fully entitled to the benefit of the provisions of self-defence entitling him to acquittal. Accused was acquitted in circumstances. **1992 S C M R 1592.**

Test of grave and sudden provocation is whether a reasonable man belonging to the same class of society as the accused, placed in the situation in which he was placed, would be so provoked as to lose his self-control and the provocation must be such as would upset not merely a hot-tempered or a highly sensitive person but one of ordinary calmness. **1992 P Cr. L J 1993.**

Accused was found to have murdered the two deceased under grave and sudden provocation. Conviction of accused on both counts was upheld accordingly. **1992 P Cr. L J 2453.**

Accused persons of ill-repute, by standing in front of complainant's house, themselves responsible for inviting an objection and when asked to move away not only persisting to stay but also exchanging abuses and grappling with complainant's son. Accused withdrawing for time being but returning next morning with deadly weapons after planning attack, resulting in death of one and injuries to ten P.Ws. Accused held, cannot be permitted to take advantage of their own conduct nor can raise plea of self-sought provocation, in circumstances. **1980 P Cr. L J 531.**

Where the accused, not finding his sister on her cot at night went outside with a hatchet in his hand and finding his sister having sexual intercourse with her paramour in a wheat field at the back of the house, killed both. It was held that the accused had not "sought" for provocation and in the circumstances of the case the benefit of this Exception was allowed to him. **P L D 1965 S C 366.** Similarly where an accused finding his sister in sexual intimacy with a stranger killed both with the help of the co-accused, his cousin, it was held that the benefit of

grave and sudden provocation went not merely to the accused but was equally available to the co-accused. **P L D 1965 Quetta 15.** Where the accused suspecting chastity of his sister, went out in search of her and killed both his sister and paramour with hatchet blows. **P L D 1963 Kar. 176.**

The appellant living as *khana damand* with his parents-in-law was suspected of having stolen the jewellery of daughter-in-law of the deceased, his father-in-law, and deceased was alleged to have asked him to return jewellery otherwise he would report matter to the Police. The appellant went away to irrigate his fields and on his return to house killed his father-in-law, mother-in-law and his own wife at night while all were in sleep. The occurrence was witnessed by the natural witnesses and the accused appellant admitted to have killed three deceased before the committing Magistrate and the trial Court but raised plea of grave and sudden provocation alleging to have seen his deceased wife in a compromising position with prosecution witness another son-in-law of the deceased. The contention that the wife of the appellant having not been wearing any shirt at the relevant time but wore only a loin-cloth and prosecution witness had been lying on a cot adjoining her cot and on appellant's arrival his father-in-law and mother-in-law had tried to alert such two persons his parents-in-law stood party to the dishonourable act of his wife and as such he killed them on grave and sudden provocation. Although the contention that the prosecution witnesses presence in a house at night and his laying on cot near cot of the appellant's wife and wife being practically naked could have given appellant grave and sudden provocation but absolutely no excuse existed for his having also committed murder of his parents-in-law. The suggestion as to the appellant's parents had been keeping guard over couple indulging in immoral activities and medical evidence had shown both such persons having been killed while lying down could not lead to interference with sentence under Section 302, P.P.C. as far as murder of appellant's parent-in-law concerned but plea of grave and sudden provocation was acceptable in so far as the murder of the appellant's wife concerned. The appellants in circumstances was convicted under Section 304, Part I, P.P.I. for murdering his wife but was convicted under Section 302 and sentenced to death for murder of his parents-in-law. **1982 S C M R 484.**

Due consideration should be given irrespective of fact as to whether such plea was taken or not. **P L D 1984 S C (AJ&K) 21.**

The accused, a son on seeing his mother having illicit relation with another man, killed both, committed the murder under compelling reasons. The sentence of the accused from Section 302, Penal Code was converted to Section 304, Part I, Penal Code and was reduced from life imprisonment and fine of Rs. 100 to the sentence already undergone (two years). **P L D 1984 S C (AJ&K) 21.**

Deceased, a *badmash* came drunk to appellant's shop telling appellant that he would not realise tax from him and wanted to be his good friend in the case appellant gave him hand of his sister. Deceased's remark for hand of appellant's sister is to be considered in context of situation wherein appellant was placed and in reference to innuendo involved and not in terms of a gentleman requesting for hand of one's sister in a respectable manner. Utterance of such descriptions by a *badmash* under influence of liquor, has a very obnoxious meanings. Utterance of deceased in circumstances, would certainly have offered a very grave and sudden provocation to appellant and appellant was quite justified in reacting to situation by causing knife injuries to deceased. **1979 P Cr. L J 663.**

Quarrelsome attitude of deceased towards accused lingering on for a pretty long time and her misbehaviour suddenly provoking accused when she slapped and grappled with him. Evidence showing deceased provoking the accused every now and then for last 2/3 days. Accused had caused death of deceased under grave and sudden provocation. **1979 P Cr. L J 473.**

Heavy sentences not called for in cases where accused deprived of self-control by sight of a woman of his family being subjected to sexual intercourse. Accused losing self-control on seeing his step-mother engaged in sexual intercourse with her paramour and murdering both

on spot. Compromise also shown to have taken place between parties. It was *held that* the case was fit one for reducing sentence. Sentence awarded to accused reduced to that already undergone by him. **1984 P Cr. L J 204.**

The defence version was that the accused finding his sister lying on the cot with the deceased got enraged and losing control of himself, picked up Kulhara lying near the cot and killed both of them under grave and sudden provocation. Such version in the attending circumstances indicated a strong possibility that the accused was not only surprised but also shocked on seeing the two of them in a compromising position. Where on hearing both the prosecution and defence versions, it was not possible for the Court to hold that the version given by the accused was not absolutely false, the benefit of the reasonable doubt would go to the accused. Conviction under Section 302, P.P.C. was accordingly converted into conviction under Section 304, Part I, P.P.C. reducing the sentence to seven years R.I. with the benefit of Section 382-B, Cr.P.C. **1993 S C M R 208.**

When an accused person admits that he has killed another, the burden of proving that he had committed no offence under the law or that his case was one of diminished liability, shifts to him. Accused has only to show that there is a reasonable probability of his version being true and to discharge his burden he need not lead any evidence of his own for he can rely entirely upon circumstances appearing from the evidence of the prosecution itself. Where the accused had stated that at the relevant time deceased was abusing his father but did not lead any evidence in that regard and there was nothing in the evidence of the prosecution which could lend support to his assertion, plea of grave and sudden provocation by accused was liable to be rejected and his conviction under Section 302, P.P.C. was not open to any objection. **1995 S C M R 1846 (a).**

Exceeding the right of self-defence : This Exception contemplates cases in which the right of private defence is exceeded. Wherever the limits of the right of defence may be marked, it will always be expedient to make a separation between murder and what is designated as voluntary culpable homicide in defence.

The principle however is clear that where a man being dangerously armed fights under an unfair advantage, the killing is murder and not merely man slaughter, even though mutual blows pass: and decisions, both here and in England, have uniformly laid down that if in course of a sudden fight one party resorts to a dangerous weapon, like a knife, a dagger, a hatchet or a fire-arm, the other party being wholly unarmed, and causes mortal injuries to his adversary, the offence committed is nothing but murder. **1981 S C M R 330.**

The person is a fit of fury and in the course of an armed confrontation cannot be expected to modulate and systemise his role in a religiously or legally cautious and guarded manner, and when tempers are high one may be driven by his dispositional indignation and made to transgress the frontiers of legal prudence, mental sanity and moral nicety, and for defending one's own life one may go to the extent of causing death of the other who has endangered his life. **1993 P Cr. L J 1333.**

The accused is the judge of his own danger and law permits him to repel the attack even to the taking of life and the Courts are to judge him by placing themselves in the same position in which he was placed. The right of private defence cannot be weighed in golden scales. The accused's version is to be accepted if the same appears to be reasonably possible in the circumstances of the case. **1993 P Cr. L J 1646.**

Although the consequences arising out of exercise of the right of defence to the extent of causing death have not been incorporated in Sections 300 and 302, P.P.C. as amended by the Criminal Law (Second Amendment) Ordinance, 1990, but still the Courts have to be guided by the Injunctions of Islam as laid down in Holy Qur'an and Sunnah. Section 338-F, P.P.C. expressly permits the Court to assess the culpability of the guilt of the accused not only under the statutory provisions of law but also under the Injunctions of Qur'an and Sunnah. **1993 P Cr. L J 557.**

Public servant or person aiding him exceeding the powers given by law : This exception provides that culpable homicide is not murder if the offender, being a public servant, or aiding a public servant, acting for the advancement of public justice, exceeds the powers given to him by law and causes death by doing an act which he, in good faith, thinks to be lawful and necessary for the due discharge of his duty as a public servant without ill-will towards the person whose death he has caused.

Death caused without premeditation in a sudden fight in the heat of passion without taking undue advantage or acting in a cruel manner : The exception requires three things for its application which must concurrently exist namely that it is a case of : (i) sudden quarrel; followed by, (ii) sudden fight; without premeditation, and (iii) no party has taken undue advantage over its adversary. Certain propositions bearing on the question are well settled. As an abstract proposition, it may readily be conceded that, whenever this exception is applicable in the beginning of a fight, it cannot necessarily be held that one of the participants has taken undue advantage over the other merely because the latter has turned tail and the former pursues the advantage he has obtained. Again it matters not, how the quarrel originated or who offers the provocation or strikes first, provided the occasion can properly be regarded as sudden and is "not made a cloak for pre-existing malice". The word "sudden" has been used in contradistinction with pre-arranged or premeditated incident. It is spontaneous, committed in the heat of passion upon a sudden quarrel without any intention to kill or injure another materially, though it might happen that in the course of the scuffle after the parties are heated by the contest and in a fit of rage, one kills the other with a deadly weapon. To such cases the exception will certainly apply. This is, however, subject to an important qualification, namely, that if there intervenes sufficient time for passion to subside and for reason to interpose the exception will not apply. **P L D 1975 S C 607; P L J 1975 S C 406.**

Police promptly informed of occurrence by the appellant accused on telephone. Investigating Officer arriving at spot, a public place, and founding injuries caused to both sides mostly by fire-arms. Venue of offence being a public place, fabrication of evidence not likely to have gone unnoticed. Three persons effectively armed if taking up positions and indulging in reckless firing, as alleged by prosecution, on a group of persons at their mercy, injuries for more numerous and grave likely to have been caused. No explanation given by prosecution for injuries on person of one on opposite side and for serious damage caused by firing to car of another accused appellant. None of parties in circumstances appeared to have made complete and true disclosure of facts or material suppression indulged in both versions. Inferences properly flowing from evidence and circumstances; that a chance encounter of two groups took place in bazar, both sides fired at each other, certain apparently unconcerned persons, happening to be there on routine also receiving injuries from stray shots, even deceased himself not object of any planned or brutal attack as disclosed by his receiving only one inlet fire-arm wound on front of chest and five others on foot or heel. Bullet a pellet recovered from dead body suggesting more than one weapon having been used by more than one assailant. The appellant's plea of being direct object of surprise attack and being on defensive not appearing plausible or consistent with venue, nature, and extent of damage to person and property. Material on record reasonably leading to conclusion of there being a sudden fight, both sides using fire-arms, none taking undue advantage, there being no common intention, and each person being responsible for his own act. **1982 S C M R 291.**

Application of S. 300, Exception 4, P.P.C. : Provision of Section 300, Exception 4, P.P.C. applies where culpable offence was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel manner. **P L D 1995 SC 464 (b).**

The sudden quarrel between the parties was followed by a sudden fight in which both the parties had caused injuries to their opponents with whatever weapon they could lay their hands on. Neither the parties had premeditated nor they had come prepared for the fight. The deceased was given only one *Barchhi* blow and the accused therefore, could not be said to

have taken any undue advantage of the situation. Exception 4 to Section 300, P.P.C. was clearly attracted in circumstances. Convictions of the accused under Sections 302/34, P.P.C. and 307/34, P.P.C. were consequently altered to Sections 304, Part 1/34, P.P.C. and 308/34, P.P.C. respectively and they were sentenced accordingly. **1993 S C M R 1329.**

Trouble starting on fight between two young boys resulting in injuries to both but soon flaring up in a sudden fight among their elders. It was *held that* : Difficult in circumstances to determine which side was aggressor and whether one or other party took undue advantage over its adversary. The case of accused, it was *held further*, was covered by exception IV to Section 300, P.P.C. and each accused was liable for his own act. **P L D 1981 Lah. 669.**

Injuries on person of main accused were not adequately explained by prosecution. Doctor though acknowledging probability of such injuries having been caused after occurrence yet taking date of his arrest in view main accused could not be imagined to have been injured while in Police custody. One of injuries on person of such accused indicating such injury being contemporaneous with time when complainant party suffered injuries. Motive asserted at trial having been rejected by the High Court and original motive asserted at F.I.R. stage having been abandoned nothing left to contradict suggestion of parties having quarrelled on some trifle, leading to a fight resulting in injuries and death of one. Case of main accused appellant, *held*, covered by Exception 4 to Section 300, P.P.C. there being no premeditation and number and nature of injuries negating any undue advantage or cruelty. Right of defence claimed for such accused at earlier stage, *held further*, not available and accused's case being covered by Section 300, Exception 4, he committed offence under Section 304, Part I of the Penal Code, 1860. **P L D 1983 S C 79.**

For giving benefit of Exception 4 to Section 300, P.P.C., Court has to conclude that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel and unusual manner. **1993 S C M R 189.**

Provision of Section 300, Exception 4, P.P.C. applies where culpable offence was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel manner. **P L D 1995 S C 464.**

Accused in order to claim benefit of Exception 4 of Section 300, P.P.C., would be legally obliged not only to prove its one or two requirements but to substantiate that all its ingredients operate in his favour. **1998 S C M R 891.**

Section 300, P.P.C. (as amended) does not provide any exception in respect of the offence of Qatl-i-Amd if committed due to grave and sudden provocation. **P L D 1995 Quetta 83.**

Both the parties receiving injuries in the same occurrence. Generally parties not coming out with true facts and trying to minimise part played by them and throwing blame of aggression on each other. Proper course for the Court, would be to draw inference from evidence and flow of circumstances of given case. **1984 P Cr. L J 2445.**

Sudden fight--Counter-case : The motive was based on some minor altercation between the deceased and the accused which had taken place some time prior to the occurrence. No serious enmity existed between the parties. Evidence in the case in which the occurrence was admitted by the accused was of usual type. Eye-witness; a dying declaration; normal investigatory recoveries; motive but not strong one for committing a planned murder; injuries on the accused showing his participation in the occurrence; and admission of the accused in the Court-F I R. of his participation, were all available. Eye-witness account showed that on a sudden quarrel relating to some trivial matter both the parties indulged in fight with each other and it was not pre-planned. Both caused injuries to each other and the nature of injuries of the deceased did not show that they were the result of any unusual or cruel act on

the part of the accused. The accused himself had received similar injuries if not of the same gravity as that of the deceased. *Held*, it was a case of sudden fight which appropriately fell within the Exception 4 of Section 300, P.P.C. and the conviction should have been under Section 304, Part I, P.P.C. The Supreme Court, while acquitting the accused of the charge under Section 302, P.P.C. altered his conviction into one under Section 304, Part I, P.P.C. **1993 S C M R 904.**

Death caused by consent of persons above age of eighteen years : The infliction of harm with the consent of the sufferer fall under the general exceptions from criminal liability contained in Sections 87 to 93 but under those sections death cannot be consented to either expressly or by implication. Under Section 87 even a person above the age of 18 years is precluded from giving a valid consent to an act intended to cause death or likely to cause death or grievous hurt. This exception provides that in such a case the person who kills the consenting party shall not be guilty of murder but he shall be guilty of culpable homicide not amounting to murder. In order to bring a case within this exception the consent must be given unconditionally and without any reservations.

In the case of sudden occurrence, conviction under Section 302 was *set aside*. The case was covered under Exception 4 of Section 300, P.P.C. **1984 P Cr. L J 1387.**

301. Causing death of person other than the person whose death was intended : Where a person, by doing anything which he intends or knows to be likely to cause death, causes death of any person whose death he neither intends nor knows himself to be likely to cause, such an act committed by the offender shall be liable for *qatl-i-amd*.

COMMENTS

Scope : This section declares an important rule deducible from Sections 299 and 300 just an explanation to a section does. The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely, to kill. The rule also states that the quality of the homicide, that is, whether it amounts to murder or not will depend on the intention or knowledge which the offender had in regard to the person intended, or known to be likely, to be killed or injured, and not with reference to his intention or knowledge with reference to the person actually killed.

This section embodies a well-established principle of criminal jurisprudence based on the doctrine of transferred malice. It is settled law that where a blow aimed at one person lights upon another and kills him, the offence committed by the assailant is the same as it would have been if the blow had struck the intended victim. Where the accused intended to kill but cause the death of B whose death he neither intended nor knew himself likely to cause death. It was *held* that he can still not be allowed to say that he really never intended to cause the death of the deceased and the death of the victim which was actually caused was never intended by him. In such a heinous crime, this defence has not been made available to the assailant. **P L D 1977 S C 53; N L R 1979 Criminal 209.**

302. Punishment of qatl-i-amd : Whoever commits *qatl-e-amd* shall, subject to the provisions of this Chapter be--

- (a) punished with death as *qisas*;
- (b) punished with death for imprisonment for life as *ta'zir* having regard to the facts and circumstances of the case, if the proof in either of the forms specified in Section 304 is not available; or
- (c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunctions of Islam the punishment of *qisas* is not applicable.

COMMENTS

Scope : The accused can come within the mischief of this section only if death is direct result of the injury. Ingredients of the offence are felonious intention and an injury causing the death. **P L D 1976 S C 377.** Culpable homicide may not be murder where the mental state is not of the special degree of criminality required by Section 300. **1981 S C M R 329.** No culpability in putting a person to death in execution of legal punishment. **P L D 1980 F S C 1.**

The sentence consequent upon a conviction for murder must be death. If there exist any grounds for mercy, that circumstance will have to be considered by the Government and all that a Court of Justice can do is to submit a recommendation after passing the sentence of law. But the law lays down two sentences in cases of murder, and naturally the Court leans towards the more lenient sentence if it is consistent with the ends of justice.

Weakness of motive does not destroy the value of the evidence. Prosecution need not establish motive at all. **P L D 1965 Kar. 31.** Prosecution must prove the death of the victim and also that death was caused by an act of the accused. The mere fact that the victim has not been seen or heard of since the occurrence cannot support a conviction under this section. **P L D 1965 Dacca 198.**

Where the accused was assigned the role of firing in the air only to share complainant party and no other overt act was attributed to him while committing the offence under Section 302, P.P.C., it was *held that* the presence of the accused simpliciter is not sufficient to saddle him alongwith others with common intention in furtherance of commission of offence as contemplated under Section 34, P.P.C. In the circumstances benefit of doubt was given to the accused and he was acquitted. **P L J 1982 Cr.C. 315.**

The accused inflicted the injuries on the deceased suspecting the deceased to be on illicit terms with his wife was awarded the punishment of death. The fact that the accused committed the murder on the assumption that the deceased had impaired his family life, and the act of murder was not the result of sudden provocation, it was *held to be* sufficiently mitigating circumstance and was *held that* death penalty was not appropriate sentence. Death sentence was substituted to that of life imprisonment. **P L J 1982 Cr.C. 360.**

The accused involved in fight and himself receiving one lacerated and three superficial abrasions, gave only one *soti* blow on head of the deceased. It was *held that* act of the accused was rightly treated to be one under Section 304, Part I. The sentence, however, was altered from one of life imprisonment to that of the ten years' rigorous imprisonment. **1984 S C M R 823.**

The prosecution failed to make any effort to ascertain the grouping of blood on the articles to establish that these were stained with the blood of the deceased and the witnesses deposed inconsistent versions, it was *held that* delay in sending blood-stained articles to chemical analyser after inordinate delay of two months and 3 days and inconsistent persons of related and interested witnesses and the delay of recovery or incriminating articles were *held to be* unreliable. **P L J 1982 Cr.C. 201.**

The accused caused the deceased simple and grievous injuries. The grievous injuries appeared to have been based on attrition as no less than three ribs were fractured besides breaking one of legs. Action of the accused has quite gruesome leading to no other inference than a sinister intent to cause death. The contention that since injuries from sharp side of hatchets were simple, intention of culpable homicide could not be imputed to the accused was acceptable. **1984 P Cr. L J 2759.**

The accused was armed with a *sota* but caused no injury. Mere presence of the accused at spot could not be equated with participation in occurrence. The accused was given benefit of doubt and acquitted. **1984 P Cr. L J 1387.**

Punishment for Qatl-i-Amd : The punishment of Qatl-i-amd can be divided into five categories. The Court can punish the offender of Qatl-i-amd in one of the following five ways:

- (a) death as Qisas;
- (b) death or imprisonment for life as Tazir;
- (c) imprisonment for twenty-five years where Qisas is not applicable;
- (d) Qatl-i-amd as under 'Ikrah-i-tam' shall be punished with imprisonment (Section 303-A); and
- (e) Qatl-i-amd under Ikrah-i-naqis shall be punished in one of the three ways mentioned above, whichever suits the situation.

(Section 303-B).

Qisas : Qisas means "to copy the other" or "to follow the path followed by the other" or "to act like the act of another". The basic principle of Qisas is similarity. If similarity of injury is not possible Qisas may not be enforced. In Qatl-i-amd the difference between punishment of Qisas and punishment of death lies in the mode of execution of sentence. **1991 P L D S C 202.**

It was held in *Safdar Ali v. The State*, **PLD 1991 SC 202** the right of Qisas means the right of causing death of the convict if he has committed Qatl-i-amd. Where life imprisonment is awarded, the question of the consent of the heirs of the victim does not arise. Such a case is compoundable under the Ordinance by an adult sane wali by accepting *Badal-i-Sulh*, with this exception that a female in marriage shall in no way be accepted as *Badal-i-Sulh*.

In another case, *Muhammad Ishaq v. The State*, **1992 P L D Pesh. 187**, the High Court held, "that the question of waiver or compounding arise only after the accused is proved guilty," a case where Qisas is not applicable. There are four cases in which Qisas is not applicable on the offender, namely :

- (1) where the offender dies before the enforcement of Qisas;
- (2) where right of Qisas is waived by any wali;
- (3) where right of Qisas devolves on the offender; and
- (4) where the right of Qisas devolves on the person who has no right of Qisas against the offender.

Qatl-e-amd committed by husband : Qatl-e-amd committed by the husband of his wife leaving behind child/children was not liable to Qisas. **P L D 1994 SC 885.** Conviction of accused under Section 302(a), P.P.C. being not sustainable in law, was altered to one under Section 308, P.P.C. as the accused being husband of the deceased was her Wali and he was sentenced to undergo 14 years' R.I. and to pay Diyat amounting to Rs. 1,70,000 thereunder. **1995 P Cr. L J 110.**

Qatl-e-amd liable to Qisas : 'Qatl-e-Amd' liable to Qisas takes place only when the person murdered is not liable to be murdered or is Masoom-ud-Dam. **1992 S C M R 2047; 1993 P Cr. L J 557.** In a case of 'Qatl-i-amd' liable to death by Qisas, the requirement is that the witnesses must stand the test of Tazkiya-tush-Shahood. **1992 S C M R 2037.** Accused had given one "Sairoo" blow on the head of the deceased and did not repeat the same. Accused had no intention of causing death of the deceased, nor had he the knowledge that the injury given by him was likely to cause death. Accused, thus, was not liable for "Qatl-i-Amd" punishable with death as "Qisas". Conviction of accused under Section 302(a), P.P.C. was altered to Section 302(c), P.P.C. and he was sentenced to undergo ten years' R.I. **P L D 1994 Lah. 43.**

Compensation : In case of punishment with death by way of Qisas no further punishment under Section 544-A, Cr.P.C. can be awarded because such compensation or payment is due only under a compromise or by way of Arsh, Daman, etc. Enhancement of punishment by such additions will be contrary to the injunctions of Islam. **1952 S C M R 2037.**

Conviction, alteration of : Accused had recklessly and brutally taken the life of 15/16 years old school-going boy after trespassing into his parents' house and deserved no leniency.

Requisite degree of proof as contemplated by Section 304, P.P.C.; however, being not available on record, conviction and sentence of death of accused was converted from Section 302(a), P.P.C. to Section 302(b), P.P.C. in circumstances. **1993 P Cr. L J 1138.** Letter written by accused demanding ransom, recovery of dead body and other incriminating articles, extra-judicial confession and the last seen evidence had linked the accused with the murder of the deceased beyond any reasonable doubt. Accused, however, could not be convicted and sentenced to death as Qisas under clause (a) of Section 302, P.P.C. as he had neither made any confession of the commission of the offence of murder nor the provisions of Article 17 of Qanun-e-Shahadat, 1984, had been complied with. Accused was accordingly convicted under cause (b) of Section 302, P.P.C. and sentenced to death as Tazir in circumstances. **1993 P Cr. L J 1047.**

Occurrence was not premeditated or pre-planned and had taken place at the spur of the moment. Conviction of accused under Section 302(b)/34, P.C.C. was altered to Section 302(c)/34, P.C.C. **1995 P Cr. L J 956.**

Occurrence according to the prosecution evidence itself had taken place all of a sudden resulting in free fight, in which both the parties had used fire-arms and the complainant party being first to do so was aggressor. Conviction of accused under Section 302, P.P.C. was consequently altered to Section 304, Part I, P.P.C. and their sentence was reduced to the imprisonment already undergone by them as they had already suffered substantive imprisonment for over 7 years, 8 months and 26 days. **1995 M L D 1539.**

Grave and sudden provocation : Pleas of grave and sudden provocation raised by accused could not have been given effect to so as to make his case fall within the ambit of clause (c) of Section 302, P.P.C. and to take the same out of the mischief of clause (a) of Section 302, P.P.C. because the requisite evidence to establish the said plea under the Islamic injunctions had not been produced by the accused. Conviction and sentence of accused under Section 302(c), P.P.C. were consequently set aside and instead he was convicted under Section 302(a), P.P.C. and was punished with death as Qisas. **1992 P Cr. L J 1596.** Occurrence was found to have taken place under grave and sudden provocation in the manner as stated by accused. Offence committed by accused was punishable under Section 304, Part II, P.P.C. and not under Section 302(c), P.P.C. (as substituted). **1992 P Cr. L J 1993.** Grave and sudden provocation is not an exception *per se* and the punishment of Qisas, where Qatl-e-Amd is committed under grave and sudden provocation, can be mitigated only if proof of Zina is produced, which conforms to the required standard of evidence prescribed under the Islamic Injunctions. **1992 P Cr. L J 1596.** Section 300 does not provide any exception in respect of the offence of Qatl-i-Amd if committed due to grave and sudden provocation. **P L D 1995 Quetta 83.**

Zina-related plea of grave and sudden provocation can be taken by the accused even after deletion of Sections 300, Exception and 304, Part I, P.P.C. and if established can serve as a mitigating circumstance for awarding lesser punishment, but the accused shall have to prove by producing evidence in accordance with the standard laid down by the Islamic Law that the victims were committing Zina liable to death. **1995 P Cr. L J 521.**

Sentence : Awarding any of the punishments under Section 302(a), (b) or (c), P.P.C. is not discretionary but depends upon the facts and circumstances of each case. If an accused has not inflicted fatal injuries to a deceased but has only caught hold of him in such manner which facilitated, aided, abetted and enabled the main accused to cause fatal blows or injuries to the deceased who became helpless to defend himself resulting in his death, then such accused may not be awarded death sentence as 'Qisas' but he cannot be saved from a sentence under Ta'zir'. **P L D 1994 Kar. 431.**

Complainant had admitted in the F.I.R. that the accused had suspected the deceased carrying on with his wife. Evidence in the case, was not processed through Tazkia-tus-Shahood. Accused while making a statement under Section 432, Cr.P.C. had only rendered his version of the incident with design to lessen the gravity of the offence and the plea taken by

him thereunder did not amount to voluntary and the confession of the offence. Accused, therefore, could not be punished with death as Qisas. Deceased was even not Maasoom-ud-Dam as he was found engaged in indecent act with the wife of the accused which was violative of the Injunctions of Islam. Conviction of accused under Section 302(a), P.P.C. was consequently altered to one under Section 302(c), P.P.C. and he was sentenced to undergo seven years' R.I. in circumstances. **1994 M L D 1704; P L D 1995 Quetta 83.**

Punishment of an offender under Section 302(c) for murder committed before introduction of Section 302(c) would not be hit by Article 12 of Constitution (1973) as penalty of 25 years' imprisonment is not greater than penalty provided by Section 302 before its repeal. **N L R 1993 Criminal 203.**

Tazir : Case against accused being not one of Qisas, his conviction and sentence of death under Section 302(b), P.P.C. by way of Tazir were upheld in circumstances. **1992 S C M R 2279.**

Tazkiya-tush-Shahood : Tazkiya-tush-Shahood of eye-witnesses having not been done in the case, accused could not be convicted. Accused who were forming a hostile group did not clear their position and instead fired extensively and caused the death of three persons and injured so many others and criminality of their act was thus established. Conviction of accused under Section 302 (a), P.P.C. was altered to Section 302(b), P.P.C. **1992 S C M R 2037.**

Fine and compensation, distinction : Fine imposed alongwith sentence of death or imprisonment for life in a murder case under unamended Section 302, P.P.C. or under amended Section 308, P.P.C. cannot be equated with the amount of compensation payable to the legal heirs of the murdered deceased under Section 544-A, Cr.P.C. Court may order for payment of the amount of fine or part thereof to the legal heirs of the deceased, but under Section 544-A, Cr.P.C. Court is bound while convicting a person for the commission of murder or hurt or injury, etc., to award compensation to the legal heirs of the deceased or to the injured unless it records reasons in writing for not doing so. **1995 S C M R 1776.**

First Information Report : F.I.R. is not supposed to be an elaborate document containing all the minute details. **1995 P Cr. L J 510.**

Delay in lodging the F.I.R. is not *per se* fatal to a case as it neither washes away nor torpedoes trustworthy and reliable ocular or circumstantial evidence. **1995 S C M R 1365.**

Delay in lodging the F.I.R. *per se* is not a ground to reject the prosecution case downright as ever, case proceeds on its own facts and circumstances and therefore, the adverse effect of delay cannot be made a rule of universal application. **1995 P Cr. L J 459.**

Prompt lodging of F.I.R. could be considered as a circumstance to corroborate ocular testimony but the question would arise as to what was the version of the incident stated in F.I.R. and whether it was believed by the Court and how the same had been evaluated. **1995 S C M R 635.**

Identification : Evidence of visual identification is one of the categories of "suspect evidence" and ordinarily it is not safe to convict the accused on the basis of such evidence without corroboration. Where, however, the evidence of visual identification is of exceptionally good quality, such as, where the offender was known to the witness, there was sufficient light, the witness had an unobstructed view of the offender and there was a dialogue between the witness and the offender, the evidence may be acted upon. **P L D 1995 S C 475.**

Sudden quarrel : The accused could legally defend the person of his nephew at the time of occurrence, but he had exceeded the right of the private defence by inflicting the solitary blow on the vital part of the body of the deceased. Occurrence was also found to have cropped up without any premeditation and in the heat of passion upon a sudden quarrel. The conviction of the accused under Section 302, P.P.C., was altered to one under Section 304,

Part I, P.P.C., in circumstances and he was sentenced to ten years' R.I. with fine. 1993 S C M R 1624.

In sudden fight there is no question of common intention and each person is liable for his own individual act. 1993 P Cr. L J 1491.

Compromise : The accused who was convicted and sentenced for murder of a person who was his own sister, had filed appeal against his conviction and sentence. During the pendency of appeal, the accused and heirs of the deceased had entered into a compromise. Compromise deed was also accompanied by affidavits sworn by heirs of the deceased in which factum of compromise was confirmed. Offence under Section 332, P.P.C. having been made compoundable and the Appellate Court having been empowered to accept composition of offence and the deceased being real sister of the accused and all heirs of the deceased being equally related to the accused who had pardoned accused in order to have better relations in future Court accepted application for compounding the offence and released the accused. 1992 P Cr. L J 982.

Father and mother of the deceased who were his "Wali" and heirs had pardoned the accused and without fear or favour had waived their right to claim compensation from the accused. Parties were related to each other and were also neighbours. Incident had taken place all of a sudden. The petition for compromise was allowed in circumstances in the interest of better relations of the parties in future. The accused was acquitted accordingly. 1992 M L D 1590.

Compromise deed did not indicate if on behalf of the minors of the deceased any one had entered into the compromise or not. Trial Court, *held*, was not justified in acquitting the accused on accepting the compromise which was not executed in accordance with the provisions of Section 309, P.P.C. Order of acquittal was consequently *set aside* and the case was remanded to the Trial Court to proceed against the accused according to law. 1993 P Cr. L J 68.

Corroborative value : Unless medical evidence is in line with the eye-witness account on all material aspects, the same cannot be treated or regarded as supporting evidence. 1998 M L D 1366.

Out of the two, legal heirs of one deceased had forgiven the accused whereas legal heirs of the other deceased were not available and no compromise could, therefore, be effected in respect of the said other deceased. The application for accepting compromise in the matter and acquittal of the accused was dismissed in circumstances. 1993 S C M R 1574.

Abscondence : Abscondence *per se* is not proof of the guilt of an accused person. Disappearance of a person named as a murderer/culprit after the occurrence is but natural, whether named rightly or wrongly. 1995 S C M R 1373.

Unless abscondence of accused is corroborated by other reliable evidence, legally it will have no evidentiary value. 1995 M L D 526.

Abscondence of accused did not have any substantial value and in the attending circumstances could not be used even as a corroborative piece of evidence. P L D 1995 Pesh. 155.

Abscondence of accused by itself does not have any substantial value it can be used as a corroborative piece of evidence. P L D 1995 Pesh. 155.

Age : Non-agreement of the Doctor on certain points with an author of a book in Medical Jurisprudence would not *ipso facto*, means that the report of the Medical Board consisting of four specialists was of no significance. Age of the accused as determined by the Medical Board thus was correct and the finding of the Medical Board was to be preferred over the Medical Certificate issued by the Surgeon. P L D 1995 Kar. 202.

Amnesty : Order of High Court upholding the conviction of accused and imposing the sentence of death was found to be correct. Benefit of amnesty order passed by the President was available to accused irrespective of the confirmation of his death sentence by High Court. Accused, therefore, was to suffer the sentence of imprisonment for life and not death with benefit of Section 382-B, Cr.P.C. **1995 S C M R 1162.**

Sadism : The deceased was a young boy of about 17 years of age. Evidence shows that the appellant was trying to play mischief with him while the deceased was resenting it. It may be presumed that the deceased at first might have been friendly with the appellant but he had afterwards given him up and turned his affection to someone else. The appellant had found as to be a good opportunity to try and win back the boy on his side. On the refusal of the boy the appellant must have got annoyed, and must have thought of gratifying his desire by destroying the very object of his love. This form of sexual perversion has also been described by Dr. Modi in his work on Medical Jurisprudence under the heading "Sadism". He has described extreme cases in which the sadist may gratify his sexual desire by murdering his beloved and causing injuries on the genitals. Dr. Modi has described such murders a "Lust Murders". In case of lust murder of a girl aged 7 years, incised wounds were inflicted on the lower part of her abdomen cutting of the public and external genitals. Such murders are generally committed due to anger, jealousy, revenge or allied motives. Murders of this type committed by sexual perverts are of common occurrence in this country. The Court felt inclined to believe that the shot was deliberately aimed at and fired by the appellant at the buttocks of the boy for similar reasons. The accused was held rightly found guilty of offender under Section 302. **1975 P Cr. L J 805.**

Mere relationship of an eye-witness with the deceased or his enmity with the accused by itself does not furnish a valid basis to reject his testimony, and in a such like case as a rule of prudence what is required is the proper scrutiny of his testimony and to seek corroboration before its acceptance. **1993 S C M R 155.**

Chance witness : Chance witness is one who is neither resident of the area nor has any business to go there and cannot be expected in the area in normal circumstances. **1993 P Cr. L J 910.**

Related and interested witness--Distinction : Related witness and an interested witness cannot be considered *at par* with each other. Interested person is one who has a motive to falsely implicate a person and he can also be a relative while a relative may not be an interested witness at all. **1983 M L D 1766.**

Sentence : High Court had reduced the death sentence of the accused to imprisonment for life on the ground that the prosecution had failed to adduce specific evidence *vis-a-vis* the motive for the occurrence. Such observation was supported by the record. Leave to appeal was refused in circumstances. **1995 S C M R 840.**

Wherever the real cause of murder is shrouded in mystery, is unknown or is concealed, Courts have normally awarded the lesser punishment under Section 302, P.P.C., as matter of abundant caution. Benefit of reasonable doubt in respect of the real cause of the occurrence was available to accused in the case for which he was rightly awarded lesser punishment of imprisonment for life by the High Court. Leave to appeal was declined accordingly. **1995 S C M R 1007.**

Immediate cause leading to the incident remained shrouded in mystery. Sentence of imprisonment for life awarded to accused in the given circumstances was sufficient to meet the ends of justice. **P L D 1995 Lah. 296.**

Motive for the murder was that the deceased had developed illicit relations with the cousin of the accused. Enhancement of sentence of accused from imprisonment for life to death was declined in circumstances and revision petition was dismissed accordingly. **1995 M L D 1088.**

Possibility of deceased having used strong and objectionable language could not be ruled out to which the accused might have acted violently which would justify lesser penalty of imprisonment for life. Sentence of imprisonment for life awarded to accused was not enhanced to death in circumstances. **1995 M L D 1126.**

As to who out of the two accused had caused fatal injury to the deceased was not clear and both of them, therefore, deserved lesser sentence. **1995 P Cr. L J 2001.**

Occurrence even according to prosecution had erupted due to involvement of family honour and the accused was 14 years old at the time of occurrence. Sentence of death awarded to the accused was altered to imprisonment for life in circumstances. **1993 M L D 1372.**

The accused was a young man aged about 18/19 years at the time of occurrence. There was an exchange of abuses before the occurrence and elder brothers of accused had commanded him to fire at the deceased. Sentence of death awarded to accused was converted to imprisonment for life in circumstances. **1993 P Cr. L J 690.**

Deceased since about two years used to frequently abandon her matrimonial home and come away to her brother's house. Once after her disappearance she was finally found in the Darul Aman and a case had been registered against the person responsible for her abduction. Sentence of death awarded to accused was altered to imprisonment for in circumstances. **1993 P Cr. L J 1203.**

Possibility that the conduct of the complainant party might have been the immediate cause of the main occurrence in which the deceased had lost his life could not be ruled out. Sentence of death awarded to the accused was reduced to imprisonment for life, in the life circumstances. **1993 P Cr. L J 1655.**

Evidence about motive had come only in the F.I.R., but the complainant during his evidence remained reticent about the same. Sentence of death awarded to the accused was altered to imprisonment for life in circumstances. **1993 M L D 1414.**

Testimony of relatives--Requirements : Testimony of relatives if corroborated by circumstantial evidence or other pieces of evidence, cannot be thrown out of consideration on the sole ground of relationship. **1996 P Cr. L J 586.**

Corroboration : Strong, independent, trustworthy and reliable corroboration of eye-witness account would be very essential to prove charge of murder under Section 302 when occurrence was a dark night occurrence and admittedly long-standing enmity existed between parties. *Held:* Conviction/Sentence recorded by trial Court merited setting aside as such corroboration was not forthcoming in present case. **1996 Cr. L J 647.**

Benefit of doubt : The reasonable doubt not an imaginary but which having regard to the circumstances of the case would be entertained by a person of common prudence. **1974 S C M R 215.** Conclusion reached without taking into consideration the relevant circumstance. Benefit of doubt given to the accused. **P L D 1973 S C 469.** Evidence of approver. Unworthy of credit. **P L D 1971 S C 447.** Evidence of eye-witnesses inconsistent with medical evidence. **1972 S C M R 74.** Prosecution witnesses interested and inimical towards accused. **1970 S C M R 140.** Enmity between the parties. Possibility of the accused being falsely implicated not ruled out. **1970 S C M R 220.** Incident in a busy market. No independent evidence. Benefit goes to the accused. **1973 S C M R 12.** Neither the prosecution nor the defence coming out with true version. Discrepancies of serious nature. Benefit given to the accused. **1973 S C M R 26.** No evidence as to which of the accused were responsible for the fatal injury. Benefit of the doubt goes to all the accused. **1968 S C M R 18.** Discrepancies between the statements of eye-witnesses and circumstantial evidence. **1977 S C M R 393.**

The principle underlying the grant of the benefit of doubt is that the degree of proof against the accused is not enough to infuse a moral certainty in the mind of the Judge as to

the commission of the offence with which he is charged and if there is a reasonable doubt regarding his guilt, the benefit of doubt is extended to him. **1993 S C M R 155.**

The accused in a criminal case starts with a presumption of innocence in his favour and when the evidence is not convincing and there is a reasonable doubt, the benefit of such doubt is to be given to him. **1993 P Cr. L J 1118.**

Anything going in favour of accused must be taken into consideration and benefit of the same, if any, be extended to him not as a matter of grace but as a matter of right. **P L D 1995 Pesh. 144.**

Acquittal of certain accused on the extension of benefit of doubt did not necessarily mean that eye-witnesses had either not seen the incident or that they had deliberately and falsely implicated he acquitted accused persons. Court in such a case was to take care that for convicting the remaining accused, the witnesses were put to hardest test of scrutiny to see if their testimony was corroborated by independent circumstances. **1995 S C M R 635.**

Circumstantial evidence : The circumstantial evidence is sufficient to sustain conviction in a murder case provided the facts proved must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than the guilt of the accused. **1993 P Cr. L J 168.**

Extension of time sought for disposal of trial : Trial Court failed to conclude the trial within the period specified by High Court and sought extension of time after the expiry of said period. Such practice was deprecated by High Court observing initially that the reference for extension of the specified period should have been made by Trial Court before the date of its expiry and secondly that the order passed by High Court should not have been taken by Trial Court in routine keeping in view the discipline followed in the judicial hierarchy with the direction not to repeat such lethargic and recalcitrant attitude in future. Directions given and guidelines provided to give due weight to High Court's Orders and to Sessions trials in the matter of their disposal. **1996 M L D 1648.**

Conviction on basis of dying declaration : Conviction can be recorded on the basis of dying declaration which rings true and is proved to have been executed. **P L D 1996 Quetta 40.**

Deceased had not made two dying declarations and his last incriminating statement such as in F.I.R. could be legitimately treated as a dying declaration. Deceased having not lost his senses and not being unable to speak, the statement or the signatures of the Doctor on the dying declaration were not necessary. Dying declaration was fully corroborated by the medical evidence as well as the recovery evidence. Empty shells recovered from the spot were found to have been fired from the pistol recovered at the instance of accused. Defence plea of *alibi* was not substantiated by reliable evidence. Accused, thus, was proved to have fired at the deceased. Accused had fired on the legs of the deceased and not on any vital part of his body and the injuries inflicted by accused, according to medical evidence, were not sufficient in the ordinary course of events to cause death of the deceased; accused, therefore, had no intention to kill the deceased and he was liable to be punished under Section 315, P.P.C. Conviction of accused under Section 302, P.P.C. was consequently altered to one under Section 315, P.P.C. and he was sentenced to pay Diyat of Rs. 1,75,000 to the Wall of the deceased and to undergo 7 years. **1996 M L D 204.**

Confession : Delay in recording confession *per se* is no ground to discard it unless it is proved or emerges from the circumstances to have been obtained by coercion, threat, pressure, etc. **1995 S C M R 1615.**

Confessional statement ordinarily should either be accepted or rejected as a whole where there is no other evidence, direct or circumstantial, to connect the accused with the crime, but in the presence of reliable, direct or circumstantial evidence Court is not bound to accept those portions of the accused's statement which on face of prosecution evidence appear to be improbable or palpably absurd. **1995 M L D 1199.**

Extra-judicial confession is generally a weak piece of evidence and has to be received with caution. Extra-judicial confession can only be worthy of credit if it comes from an unimpeachable source and is corroborated by any piece of credible evidence. **1995 M L D 664.**

Extra-judicial confession made by accused jointly is not admissible in evidence. **1995 P Cr. L J 1804.**

Confessional statement of accused alone cannot form the sole basis for the conviction of co-accused, moreso when the alleged confession is tainted with doubt as to its voluntary nature and above all is retracted subsequently. **1995 P Cr. L J 2031.**

Acquitted co-accused in his confessional statement had neither confirmed the contents of extra-judicial confession made by the accused nor mentioned his role in the occurrence rather retracted his extra-judicial confession. Such confessional statement of the said co-accused could not form a basis for conviction of accused against whom no other evidence was available on record. Accused was acquitted in circumstances. **1995 P Cr. L J 2031.**

Criminal trial : Trial on private complaint and police challan relating to same murder. Procedure detailed. **1995 P Cr. L J 1900.**

Dying declaration : Dying declaration alone cannot be made a sole basis to award conviction unless corroborated, but such corroboration is not a rule of law but a requirement of prudence. **P L D 1995 Quetta 56.**

It is not essential for the admissibility of dying declaration that deceased must have been apprehending death at the time of making it. Only requirement is that such deposition must relate to the cause of maker's death or the circumstances which resulted in his death. **P L D 1995 Quetta 56.**

Dying declaration requires a thorough scrutiny before placing reliance on it and ordinarily it should not be presumed that truth always sat on the lips of a person who is expecting his death. **P L D 1995 Quetta 56.**

Dying declaration recorded at police station in presence of deceased's relatives is always suspected to place implicit reliance on it. **P L D 1995 Quetta 56.**

F.I.R. in the case was the dying declaration made by deceased which was not proved as the Investigating Officer who had recorded the same and made investigation in the case had not been examined. Non-examination of Investigating Officer, in the circumstances, was an illegality not curable under Section 537, Cr.P.C. Time-barred appeal filed by accused was, therefore, treated as revision, conviction and sentence of accused were set aside and the case was sent back to Sessions Court for fresh decision after examining the investigating Officer and the accused under Section 342, Cr.P.C. in accordance with law. **P L D 1995 Pesh. 103.**

Dying declaration, corroboration of. Dying declaration may not require independent corroboration when there is no reason for substitution of real culprit. **1996 P Cr. L J 1689.**

Falsus in uno falsus in omnibus : Doctrine of "*falsus in uno falsus in omnibus*" is not recognised by Courts in Pakistan. Court in order to arrive at right conclusions is duty bound to sift grain from the chaff. **1995 S C M R 1365.**

Court is duty bound to appraise the evidence in such a way that falsehood is separated from truth which is called "sifting of grain from chaff". **P L D 1995 S C 488.**

Principle of "*falsus in uno falsus in omnibus*" is not of universal application and principally chaff from grain is to be separated for the ends of justice. **1995 P Cr. L J 1456.**

Anti-Terrorism Act, 1997, Section 6 : Offence having been committed by using a fire-arm definitely fell within the ambit of the term "Terrorist act" used in Section 6 of the Anti-Terrorism Act, 1997 and no lawful exception could be taken to the assumption of jurisdiction by the Special Court in circumstances of the case. Complainant's testimony was direct, natural

and consistent. Other eye-witnesses who had satisfactorily accounted for their presence at the site at the relevant moment and who were independent witnesses had directly incriminated the accused for the car driven by him and the number of shots fired by him and their evidence inspired confidence. Revolver recovered from the flat of accused had matched with the crime empties secured from the place of occurrence. Confessional statement made by accused before the D.S.P. appeared to be true and voluntary. No mitigating circumstance warranting a lenient view in the matter of sentence was available in favour of accused. Conviction and sentences of accused under Sections 302 and 324, P.P.C., including the sentence of death were upheld in circumstances. Conviction and sentence of accused under Section 337-F (iii), P.P.C., were, however, *set aside* as he was neither charged for the said offence nor called upon to meet the same at the trial. **1998 M L D 1400.**

Police witness : Police witnesses who stand firm to the test of cross-examination and whose version remains unshaken can be relied upon in a similar manner as those from public. **1995 M L D 1088.**

Private defence, right of : Where a person is otherwise justified in using force to defend his property against an unlawful aggression, he does not lose this right if he prepares and then exercises it. **1995 P Cr. L J 1842.**

Recovery : Recovery of gun could not be relied upon as the same having not been sent for examination of the Fire-Arm Expert. **1995 S C M R 896.**

Delay in sending the crime empties to Forensic Science Laboratory *per se* is no ground for rejecting such evidence and throwing away the entire prosecution evidence otherwise found reliable by Trial Court. **1995 S C M R 1112.**

Recovery of gun is of no consequence if no empty was recovered from the place of occurrence. **1995 P Cr. L J 2001.**

Non-recovery of any incriminating material from the spot would not render the prosecution case doubtful if it was otherwise proved. Occurrence had taken place in broad daylight and only a single accused had been implicated in the crime. Prosecution witnesses had no reason to falsely implicate the accused. Leave to appeal was refused in circumstances. **1995 S C M R 1806.**

Simultaneous conviction : On conviction of an accused under Section 302, P.P.C. it would be deemed that the evidence is available to prove the case against him and, therefore, provisions of Section 201, P.P.C. would not be applicable in the case. **1993 P Cr. L J 1011.**

Ocular evidence, appraisal of : When an eye-witness compromises his integrity and makes a false statement by way of addition or improvement in his deposition and on that account one or more accused in that case are acquitted, then in such circumstances great care and caution is to be exercised in dealing with evidence of such witness for the purpose of its evaluation in respect of conviction of other accused and is to be accepted only when it is supported by independent corroboration. **P L D 1993 S C 251.**

Insanity : One of the essential ingredients of crimes is intent. Intent involves an exercise of the reasoning powers, in which the result of the criminal act is foreseen and clearly understood. Another essential element of crime is *animus*. *Animus* involves an exercise of reasoning powers, in which the result of the criminal act is recognized as being contrary to the rules of law and justice. If a person is mentally unsound, one of both of these elements may be, and usually are, wanting. An idiot may set fire to a house, without understanding that it will result in the destruction of the house, or that it is forbidden by law. In such case there would be an absence of both intent and *animus*. An monomaniac may kill a man under the insane delusion that the man is an enemy who is about to kill him. Here there is an intent as the monomaniac clearly understand that the act will result in the victim's death; but there is a lack of *animus* because he believes that he is justified, and that the act, therefore, is right in the sight of the law. It is clear, then, that where the mind of the perpetrator is so diseased as to

exclude the presence of an intent or *animus* in the commission of the crime in question, he should not be punished as a criminal. **P L D 1975 Lah. 658; P L J 1975 Cr.C. (Lah.) 302.**

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Joint trial--Jurisdiction : Main offence committed by the accused was the murder and the possession of explosive substance in a bomb or grenade at the time of the commission of the murder under suspicious circumstances was a secondary offence which was subsequently committed by him as and when a certain grenade/bomb was recovered from him at the time of his arrest after the occurrence. The offence under Section 13 of the Arms Ordinance *vis-a-vis* possession of an unlicensed .12 bore pistol and .12 bore two live cartridges was not a scheduled offence and was not triable by the Special Court. The convictions and sentences awarded to the accused by the Special Court on all the charges were consequently *set aside* and the case was remanded for the trial of the accused only on the charge under the Explosive Substances Act, 1908, with direction for his trial on the charges under Section 302, P.P.C. and Section 13 of the Arms Ordinance, 1965, by other competent Courts. **P L D 1993 Pesh. 25.**

Injuries : Injuries to a person if sufficient to cause death in ordinary course conclusion as to intervention of medical attention or inattention having accelerated or contributed to victim's demise is irrelevant. **1981 S C M R 663.**

The injuries on front of left side of the chest and on back of right side of the head with *sota* stated in post-mortem report to have been caused by the blunt weapons though it was expressed by medical evidence that both these injuries could be caused by fall on hard substance. Parties met on katcha path adjoining field and no evidence as to hard surface or any substance being available. Medical evidence could not be entertained and the accused from their conduct by hitting vital part of the deceased and way they behaved formed intention to kill or cause such bodily injury as having effect of causing death in ordinary course of nature and had knowledge that the death could be caused. **P L D 1983 Lah. 639.**

Intention : First information report read with medical evidence showing prosecution witnesses having substantially told truth and not substituted any other person for actual culprits. Medical evidence showing all injuries having been caused by *tamancha* of the same bore as allegedly carried by accused, conclusion as to which accused injured which victim, however, not safe to draw, circumstances nevertheless, showing a common intention having developed when altercation between parties started and murder of one victim committed. Subsequent happenings including murders, in circumstances, were held to be result of common intention of all accused and community of intention existing between all culprits, all jointly responsible tendered for causing murders. **P L D 1981 Pesh. 23.**

Siakari of the deceased was the only motive indicated in ocular testimony but it was not proved as to with whom deceased was declared Karo or that earlier he was declared Karo with

certain woman. The witnesses did not dilate on subject of motive more than short dialogue that ensued between the assailant and the deceased and actually abandoning motive. The motive abandoned as such was false and it will adversely react on version of the eye-witnesses. 1984 P Cr. L J 2443.

Benefit of Section 382-B, Cr.P.C., grant of : Counsel for accused had pressed the appeal only for grant of benefit under Section 382-B, Cr.P.C. Accused had raised the plea of private defence of person and property in his defence on which leave to appeal had been granted to him by Supreme Court. High Court had not considered the plea of accused for extending the benefit of Section 382-B, Cr.P.C. to him in the impugned judgment. Prosecution had not opposed the said plea of accused. Benefit under Section 382-B, Cr.P.C. was extended to accused in circumstances. 1998 S C M R 1365.

Preliminary investigation : If the police officer renders complainant's statement into formal F.I.R. on hearing her and on, of course, making further enquiry from her about material aspects of the incident necessary to constitute F.I.R. in proper form, the same does not amount to undertaking a preliminary investigation. 1993 P Cr. L J 939.

Investigation was dishonest : F.I.R. had been lodged after deliberation and consultation. Eye-witnesses were not present at the spot and the occurrence was unseen. Ocular evidence did not inspire confidence and could not be safely relied upon. Recovery of weapon of offence was doubtful. Accused were acquitted in circumstances. P L D 1996 Lah. 286.

Investigation—Lapse by police officer : The Investigating Officer despite a mention having been made by the complainant in the F.I.R. about motive regarding teasing of the daughter of the accused by the deceased, never checked up with the said accused about his daughter or her condition and he on account of his misconduct in the investigation and the handling of the incident had been suspended. Said Investigating Officer, however, was restored to duty within three months. The Inspector-General of Police was directed to look into the matter and the conduct of the said police officer and to report the final action taken by him to the High Court. P L D 1993 Lah. 489.

Finding in a collateral matter, effect of : Finding of a Court in a collateral matter cannot have a binding effect on another Court of equal or superior jurisdiction where such a fact was directly in issue at an independent trial. P L D 1993 Lah. 533.

Alteration of sentence from death to life imprisonment—Validity : The High Court had altered the death sentence of the accused to life imprisonment as he was 14-15 years of age at the time of occurrence and might have acted under the influence of his elder brother which were valid considerations. The alternate sentence of the imprisonment for life awarded to the accused, therefore, was not interfered with. 1993 S C M R 944.

Medical evidence : All that the medical evidence does is to prove the location of injury on the person, its impact on the life of the victim and the weapon used for causing such injury. Medical evidence cannot on the facts of the case lend any support to the manner of the occurrence of the incident. 1992 M L D 200.

The medical evidence by itself cannot throw any light on the identity of the accused. In the case of evidence of interested witnesses if medical evidence is consistent with ocular evidence it may furnish some limited corroboration of the ocular evidence if it can lead to the inference that eye-witnesses have spoken the truth, but this will be in special circumstances. P L D 1993 Kar. 347.

The medical evidence is corroboration to show that injuries were caused in a particular manner with particular weapon and even it can supply corroboration to the fact as to how many assailants there were and whether number of injuries is commensurate with number of assailants or not, but medical evidence can never be used as corroboration *qua* accused to show that particular accused has caused these injuries. **P L D 1993 S C 251.**

When the presence of an eye-witness had been challenged the medical evidence though in conformity with the statement made by him could hardly be treated as a corroborative piece of evidence to support his testimony. **1995 S C M R 896.**

Medical evidence, does not itself prove the prosecution case and can be useful either as corroborative evidence to the prosecution or for contradiction by the defence. **1995 P Cr. L J 765.**

Where ocular account is inconsistent in material facts with medical opinion, which is result of careful observation, then preference should be given to medical opinion. **1995 P Cr. L J 459.**

The medical evidence was in consonance with ocular testimony and statements of the accused. Case being of free fight each of the participants was responsible for his individual act. The accused had caused one injury with blunt weapon on the head of the deceased and did not repeat the same. Conviction of the accused under Section 302, P.P.C. was, therefore, altered to Section 304, Part II, P.P.C. and his sentence of imprisonment for life was reduced to imprisonment already undergone by him. **1993 P Cr. L J 1479.**

Prosecution witnesses having changed their version materially at the trial, their testimony did not inspire confidence and the same could not be safely relied upon. Not only the narration of the incident had been changed but a new factor by way of motive which was not set up in the F.I.R. had been introduced during trial with a view to make the statements to look reliable and trustworthy. Medical evidence was not in consonance with ocular account. Recovery of gun, in the absence of recovery of any empty for being matched with it, was inconsequential and the Report of Forensics Science Expert in that behalf, was of no help to prosecution. Prosecution evidence was discrepant on material points. Accused was acquitted in circumstances. **1998 M L D 1366.**

Contents of stomach could not be made basis for coming to any conclusion regarding time of death of deceased as digestive system varied from person to person by the quality and quantity of food which was taken by the deceased. Digestive system of a sleeping person would work slow as compared to an awakened and active person. **1998 M L D 1372.**

Motive : When the motive was alleged by prosecution, it was its duty to prove the same. Failure of prosecution to prove the motive could be fatal to prosecution case. **1992 M L D 200.**

It is not necessary for prosecution to show motive, but once motive is alleged, the same has to be proved. **1992 M L D 182.**

Motive even if not established case would nevertheless stand proved if other clear and convincing evidence exists. Motive if urged but not established can only place Court on guard but cannot *ipso facto* destroy case. **P L D 1980 Lah. 154.** Motive is often used in law as a corroboration but in certain cases it is just a second name of enmity. **P L D 1981 Kar. 1.**

Prosecution is under obligation to prove motive for the commission of the offence if advanced by it. Failure to do so would be fatal for the prosecution. **P L D 1995 Pesh. 144.**

Motive being a double-edged weapon cuts both ways and which way it actually cuts depends upon the peculiar circumstances of the case. **P L D 1995 S C 526.**

Allegation and proof of motive is not a legal requirement to award maximum penalty of death in a murder case. **1995 S C M R 1776.**

Motive in a case of two opposite versions about the same incident assumes crucial importance. **1995 P Cr. L J 2001.**

Motive was not directly attributed to the accused. Death sentence awarded to accused by Trial Court was reduced to imprisonment for life in circumstances. **1995 M L D 1452.**

It is not always for the prosecution to set up a motive, as the same is hidden in the mind of the offender who rarely discloses the same. **1995 M L D 1199.**

Motive for the murder was shrouded in mystery. Sentence of death awarded to accused was commuted to imprisonment for life in circumstances. **1995 M L D 1999.**

Plea taken by accused was not substantiated on record : Witnesses had no motive or enmity to falsely implicate the accused in the case and mere relationship was not enough to discredit their testimony. Recoveries had been effected on the pointation of accused from the places exclusively in his knowledge. Dead body of the deceased had been deliberately mutilated and disfigured after he had been killed. Motive for the occurrence was available on the record. Trial Court in view of the tender age of the accused had already dealt with him leniently in the matter of sentence. Conviction and sentence of accused were upheld in circumstances. **1998 P Cr. L J 1402.**

Burden of proof : The prosecution has to prove its case against the accused beyond shadow of reasonable doubt and prosecution cannot take benefit of weakness of defence plea. **P L D 1993 S C 251.**

Fact that the accused failed to prove his plea raised in defence can neither reduce the burden of the prosecution to prove the case against him beyond all reasonable doubt nor it could be taken into consideration as a proof in support of the prosecution case. **1993 S C M R 1628.**

The prosecution is duty bound to prove the case against the accused beyond doubt and this duty does not change or vary in the case in which any defence plea is taken. **1993 S C M R 417.**

The prosecution is duty bound to prove its case beyond all reasonable doubt. Defence need not disprove the prosecution case. All that the defence is required to do is to create a dent in the case of prosecution and once the defence succeeds in doing so, the benefit of doubt has to go to the accused. **1993 P Cr. L J 1011.**

Prosecution must prove its case against the accused beyond reasonable doubt irrespective of any plea raised by him in his defence. **1995 S C M R 1377.**

Question of burden of proof on the accused to establish his plea in defence does not arise until the case is established against him by prosecution. **1995 S C M R 1377.**

One single reason would be sufficient for discarding statement of a witness if it creates reasonable doubt in a reasonable mind regarding his presence at the spot. **1995 S C M R 1730.**

Burden is not on the accused to disprove the case of prosecution, he is only required to create a doubt in the prosecution case and once he succeeds in doing so he is entitled to benefit of doubt. Prosecution, however, has to prove its case against the accused beyond reasonable doubt. **1995 P Cr. L J 1302.**

Substitution : Substitution is a rare phenomenon which may occur in a situation where identity of an accused is in doubt either due to the darkness or otherwise depending on the circumstances of each case. **1995 P Cr. L J 1816.**

Suspicion : Suspicion, howsoever strong, cannot attain the position of proof. **P L D 1995 Lah. 498.**

Trial in absentia : Accused having been tried in absentia by Special Court, their trial stood vitiated. Conviction and sentence of accused were consequently set aside with the direction of their fresh trial by Trial Court in their presence in accordance with law. **1995 M L D 1526.**

Two views/versions : Court has to put the prosecution version and the defence version in juxtaposition and then to see which version is more probable and nearer to truth, subject to the condition that burden to prove the case always remains on the prosecution. **1995 P Cr. L J 1816.**

If two views in a case are possible, the view which is more favourable to the accused is to be accepted. **P L D 1995 Kar. 202.**

Counter-version of the incident put up before the Investigating Agency at the earlier stage assumes greater significance and the Courts have to give it due weight in the light of the attending circumstances. **1995 M L D 749.**

Witness : Eye-witnesses though related to the deceased but were not inimical to the accused. Mere relationship of witnesses with deceased would not discredit them particularly if they had made consistent statement and had not been shaken in cross-examination. **1995 S C M R 900.**

Evidence of the witnesses sought to be recalled had been recorded in the presence of the Defence Counsel and if later on the accused by undue influence and pressurising the eye-witnesses had manoeuvred a letter from the complainant and an affidavit from another witness, then recalling and re-examining those witnesses was not essential for the just decision of the case; rather it could create hurdle in the conclusion of the trial and could definitely open a flood gate for facilitating the accused to win over the witnesses. Revision petitioner was dismissed accordingly. **1995 P Cr. L J 1932.**

Evidence of child witness possessing sufficient understanding can be believed and relied upon for conviction. **1995 SCMR 1615.**

Appeal against acquittal : The complainant cannot be allowed to get the last seen evidence appraised by the Supreme Court in appeal against acquittal. **P L D 1992 S C 570.**

Prosecution, in appeal against the acquittal, has to stick to the version given by prosecution witnesses. Where the prosecution was not sticking to the version of prosecution witnesses, the benefit of doubt would go to the accused: **P L D 1992 S C 570.**

No right of self-defence existed to the accused in opening an attack and killing innocent people in the house of the complainant during the night. Ocular account was corroborated by

the medical evidence. Motive for the occurrence stood proved. Incident, thus, was proved to have taken place in the manner as disclosed by the prosecution and the defence version when placed in juxtaposition was established to be an afterthought and a concocted one to defeat the ends of justice. Occurrence seemed to have happened so quickly on the spur of the moment as to exclude any community of purpose amongst them reflecting their common intention and its furtherance. The accused, therefore, were *held*, liable for their individual acts and they were convicted and sentenced accordingly. **1993 P Cr. L J 1536.**

Accused who was empty-handed had allegedly held the deceased by his legs when his co-accused inflicted hatchet injuries on various parts of his body. In view of the role allegedly played by accused and for the reasons stated by High Court for his acquittal no interference by Supreme Court was called for. **1995 S C M R 1141.**

Contention was that the prosecution case having been proved beyond reasonable doubt by ocular evidence of unimpeachable characters which was supported by medical evidence, High Court's judgment acquitting the accused was not based on cogent and valid reasons. Leave to appeal was granted to the complainant for reappraisal of prosecution evidence for safe administration of criminal justice. **1998 S C M R 1212.**

No ocular evidence was available to connect the accused with the commission of the offence. Unexplained long silence of prosecution witnesses about the extra-judicial confessions allegedly made by accused had made their genuineness doubtful and the same were not corroborated by any independent or unimpeachable circumstances. Prosecution evidence was neither probable nor inspired confidence. Concurrent finding of acquittal by Courts below was based on cogent and sound reasons and did not suffer from any impropriety, illegality or infirmity. Leave to appeal was refused to complainant by Supreme Court accordingly. **1998 S C M R 1281.**

Findings of Federal Shariat Court in favour of acquittal of the accused had been materially influenced by certain wrong and erroneous assumptions based on misreading and non-reading of the record. Judgment of Federal Shariat Court acquitting the accused was consequently *set aside* and the case was remanded to the said Court for disposal of the appeal afresh in accordance with law. **1998 S C M R 1265.**

Statement of one prosecution witness regarding "last seen" evidence having not been recorded by the Investigating Officer under Section 161, Cr.P.C., his evidence had no evidentiary value and was inadmissible. Other prosecution witness relating to "last seen" evidence admittedly had strained relations with the deceased and his statement could not be relied upon without corroboration by unimpeachable testimony which was lacking. There being no direct evidence of the murder, conviction on the basis that the accused was the last person seen with the deceased was not maintainable. Manner in which the recoveries were made from the house of the accused was not believable which were even violative of the mandatory provisions of Section 103, Cr.P.C. Accused was acquitted in circumstances. **1996 M L D 1311.**

Quashing of proceedings : Version of the incident as given in the F.I.R. could not by any stretch of imagination made out any case against the accused for the murder even on the basis of vicarious liability. No identification test of the accused had been held so as to connect him with the commission of the offence. Prosecution evidence against the accused could not end in his conviction and continuance of proceedings pending against him in the Trial Court would have amounted to abuse of the process of the Court. Proceedings against the accused were quashed accordingly. **1993 P Cr. L J 1135.**

Appraisal of evidence : F.I.R. had been promptly lodged. Prosecution witnesses had no motive for false implication of accused. Ocular account of occurrence was consistent and was strongly corroborated by medical evidence, positive Chemical Examiner's Report, Serologist's Report and recovery of incriminating articles on the pointation of accused duly attested by independent witnesses. Accused was, thus, proved to have committed Zina-bil-jabr with the deceased and given fatal Chhuri blows to her on her resistance. Convictions and sentences of accused under Section 302, P.P.C. and Section 10(2) altered to S. 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 were maintained in circumstances. Sentence of whipping was, however, set aside being no more required under the law. 1998 P Cr. L J 638.

F.I.R. was lodged promptly leaving no time at the disposal of the complainant to plan, consult, deliberate or hatch a conspiracy with any one to lodge a false F.I.R. against the accused. Plea taken by accused and suggested to prosecution witnesses at the trial that the complainant after having come to know about the illicit relationship between his deceased sister and her paramour, had himself throttled her to death due to "Ghariat" and had falsely implicated him (accused) in the case at the instance of his enemies, was self-contradictory and not believable. Ocular testimony inspired confidence and was worth reliance. Medical evidence had fully corroborated the ocular account. Accused neither plausibly nor justifiably could be believed to be of 12 years at the time of occurrence. Convictions and sentences of accused including sentence of death were confirmed in circumstances. 1998 P Cr. L J 590.

303. Qatl committed under ikrah-i-tam or ikrah-i-naqis : Whoever commits *qatl*,--

- (a) under *Ikrah-i-tam* shall be punished with imprisonment for a term which may extend to twenty-five years but shall not be less than ten years and the person causing '*ikrah-i-tam*' shall be punished for the kind of *qatl* committed as a consequence of his *ikrah-i-tam*; or
- (b) under '*ikrah-i-naqis*' shall be punished for the kind of *qatl* committed by him and the person causing '*ikrah-i-naqis*', shall be punished with imprisonment for a term which may extend to ten years.

COMMENTS

Qatl committed under "Ikrah-i-Tam"--Essentials : Perusal of Section 303(a), P.P.C. with Section 299(g), P.P.C. highlights three requirements: (i) putting any person, his spouse or any of his blood relations within the prohibited degree of marriage in fear of instant death; or (ii) instant permanent impairing of any organ of a body; or (iii) instant fear of being objected to sodomy or Zina-bil-Jabar. P L D 1997 Lah. 110.

304. Proof of qatl-i-amd liable to qisas, etc. : (1) Proof of *qatl-i-amd* shall be in any of the following forms, namely:--

- (a) the accused makes before a Court competent to try the offence a voluntary and true confession of the commission of the offence; or
- (b) by the evidence as provided in Article 17 of the Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984).

(2) The provisions of sub-section (1) shall, *mutatis mutandis*, apply to a hurt liable to *qisas*.

COMMENTS

Injury received by deceased was not so grave as to cause instantaneous death, but the same proved fatal and the deceased died in the hospital after seven days. Accused had not repeated the blow and he had not acted in a brutal and cold-blooded manner. F.I.R. had been

lodged after an unexplained delay of 16 hours. Conviction of accused under Section 302, P.P.C. was, in circumstances, altered to Section 304, Part II, P.P.C. and his sentence of imprisonment for life was reduced to six years' R.I. with reduction in fine. **1997 P Cr. L J 754.**

Ocular account having been belied by the medical evidence was highly doubtful and could not be relied upon. Motive as set up by the prosecution was not proved. Accused had admitted in his examination without oath to have fired at the deceased with his licensed pistol in the defence of his wife who had been hit with the carbine by the deceased and his version was corroborated by the medical evidence which was nearer to truth than the prosecution version. Occurrence had also taken place in front of the house of the accused where the deceased had come. Accused, however, in having fired more than one shot hitting the deceased had exceeded the right of private defence of his wife. Conviction of accused under Section 302, P.P.C. was set aside in circumstances and instead he was convicted under Section 304, Part II, P.P.C. and sentenced to seven years' R.I. with fine. **1997 P Cr. L J 829.**

Sentence, reduction in : Prosecution case itself spelled out a case of sudden and grave provocation and the benefit available under the law had to be extended to the accused. Nature and extent of provocation having not been brought on the record, accused was entitled to lesser punishment. Sentence of accused was reduced accordingly. **1995 P Cr. L J 242 (b).**

Conviction for--Challenge to : Appellant who gave statement under Section 342, Cr.P.C. and also examined himself as D.W. 1 gave a lengthy statement admitting about all relevant facts except commission of offence. *Held:* Version given by appellant in respect of manner of firing with which deceased was hit does not fit in the circumstances of case. Site, location and direction of injury in such way do not support version of accused rather it cannot be explained on any other hypothesis that deceased was fired upon by somebody else and in facts of case it could be only accused and none else. *Held further:* Conviction of appellant is maintained. Appeal dismissed. **PLJ 1996 Cr.C. 1777 = 1997 P Cr. L J 178.**

Confession : Statements made by accused under Section 342, Cr.P.C. could hardly be termed as "voluntary" and "true" confessions as required under Clause (a) of Section 304, P.P.C. as proof for Qatl-e-Amd warranting sentence of death by Qisas. The Legislature itself has laid stress on the words "voluntary" and "true", confession the Courts should adhere to the language strictly while acting upon the same. **P L D 1993 Lah. 345.**

Accused had no enmity with the deceased. Dead body of the deceased having not been subjected to post-mortem, exact cause of his death could not be ascertained. Deceased, however, had died by striking against the motor-cycle of the accused. Conviction of accused was consequently altered from Section 304, P.P.C. to Section 338, P.P.C. and he was sentenced to pay a fine of Rs. 10,000 only as he was a student and of 20 years of age and was facing the case for the last more than nine years. **1995 P Cr. L J 1249.**

Suspicion : Suspicion, however strong, by itself cannot take the place of proof and warrant a conviction. Prosecution has to succeed on its own merits and every doubt has to be resolved in favour of accused. **1995 P Cr. L J 1212 (c).**

Private defence, right of : Plea of private defence, if substantiated on the prosecution evidence itself, must be accepted and its benefit be given to the accused. **1995 P Cr. L J 938 (c).**

Leave to appeal : Leave to appeal was granted by Supreme Court to the complainant to examine, *inter alia*, whether the reasons given by High Court for converting the offence of accused from Section 302, P.P.C. to Section 304, Part I, P.P.C. could be treated as valid reasons and whether in case of restoration of conviction of accused under Section 302, P.P.C., sentence of death could also be restored in peculiar circumstances of the case. **1998 S C M R 1607**

Appreciation of evidence : Act which caused death was not done with the intention of causing death or causing such bodily injury as was likely to cause death and Part I of Section 304, P.P.C., therefore, was not attracted. Case was covered by Part II of Section 304, P.P.C. as

there was no intention to cause death or cause such bodily injury as was likely to cause death which provided for imprisonment of either description for a term which may extend to 10 years or with fine or with both. Accused was consequently convicted under Section 304, Part II, P.P.C., and sentenced to 10 years' R.I. thereunder. **1998 S C M R 1552.**

305. Wali : In case of *qatl*, the *wali* shall be--

- (a) the heirs of the victim, according to his personal law; and
- (b) the Government, if there is no heir.

COMMENTS

Wali : Adult sane Walis of deceased waived their right of Qisas without any compensation. Walis of minor heirs of deceased compounded right of Qisas on their behalf against value of Badal-i-Sulh which was not less than the value of Diyat. Waiver and compounding of Qisas having been accepted, accused was acquitted in the overall public interest as well as in interest of adult sane Walis and also in the interest of minor Walis in circumstances. **1991 M L D 1875.**

306. Qatl-i-amd not liable to qisas : *Qatil-i-Amd* shall not be liable to *qisas* in the following cases, namely:--

- (a) when an offender is a minor or insane:

Provided that, where a person liable to *qisas* associates himself in the commission of the offence with a person not liable to *qisas*, with the intention of saving himself from *qisas*, he shall not be exempted from *qisas*;

- (b) when an offender causes death of his child or grand-child, howlowsoever; and
- (c) when any *wali* of the victim is a direct descendant, howlowsoever, of the offender.

COMMENTS

Qatl-i-Amd Not Liable to Qisas : Qisas cannot be levied on the following four types of persons:

- (a) where the offender is minor;
- (b) where the offender is insane;
- (c) where the victim is offender's child, grandchild howlowsoever;
- (d) where any wali of the victim is direct decedent howlowsoever of the offender.

Where the *Qatl-i-amd* is not liable to Qisas, the offender shall be liable to Diyat plus upto fourteen years imprisonment may also be awarded as Tazir.

Tazir : It means punishment prescribed and awarded by the Court other than Qisas, Diyat, Arsh or Daman. It includes punishment of imprisonment, forfeiture of property and fine. Award of Tazir has been left at the discretion of the Court which should be exercised in a judicial manner and according to facts and circumstances of the case.

It was held in *Muhammad Ashraf v. The State*, **P L D 1991 Lah 347** unguided and unlimited power should be vested in Courts to award punishment of imprisonment by way of Tazir after grant of forgiveness or receipt of Badal-i-Sulh by the victim or the heirs of the victim, as the case may be.

Diyat : Diyat is defined in the Ordinance as the compensation specified in Section 323 payable to the heirs of the victim by the offender. The words 'heirs of victim' have been used

and not the words 'the victim or his heirs'. This means that Diyat is a compensation payable only in cases of Qatl, and not in cases of hurt. The consideration for compounding of Qisas or for compromise or waiver cannot be classed as Diyat. The said consideration is Badal-i-Sulh and is settled by the parties themselves subject to condition that Badal-e-Sulh shall not be less than the value of Diyat.

In case of failure to pay Diyat the convict shall be kept in jail to suffer simple imprisonment "until the Diyat is paid in full". If the convict dies before the payment of Diyat or any part thereof, it shall be recovered from his estate. It was held in *Ghulam Hussain and another v. The State*, P L J 1993 (Cr.) Lah. 60, where an offence is not liable to Qisas and is thus liable to payment of Diyat, accused cannot let off but can be punished with imprisonment by way of Tazir.

307. Cases in which Qisas for qatl-i-amd shall not be enforced : (1) Qisas for qatl-i-amd, shall not be enforced in the following cases, namely:--

- (a) when the offender dies before the enforcement of qisas;
- (b) when any wali voluntarily and without duress, to the satisfaction of the Court, waives the right of qisas under Section 309 or compounds under Section 310; and
- (c) when the right of qisas devolves on the offender as a result of the death of the wali of the victim, or on the person who has no right of qisas against the offender.

(2) To satisfy itself that the wali has waived the right of qisas under Section 309 or compounded the right of qisas under Section 310 voluntarily and without duress the Court shall take down the statement of the wali and such other persons as it may deem necessary on oath and record an opinion that it is satisfied that the waiver or, as the case may be, the composition, was voluntary and not the result of any duress.

Illustrations

- (i) A kills Z, the maternal uncle of his son B. Z has no other wali except D the wife of A. D has the right of qisas from A. But if D dies, the right of qisas shall devolve on her son B who is also the son of the offender A. B cannot claim qisas against his father. Therefore, the qisas cannot be enforced.
- (ii) B kills Z, the brother of their husband A. Z has no heir except A. Here A can claim qisas from his wife B. But if A dies, the right of qisas shall devolve on his son D who is also son of B, the qisas cannot be enforced against B.

COMMENTS

Scope : Essential ingredient of the offence under Section 307, P.P.C. is intention or knowledge. Intention is a state of the mind which cannot be ascertained ordinarily, but can only be inferred from the acts of the accused person or from the circumstances. Procedure detailed. 1995 P Cr. L J 689.

Accused had fired only one shot and did not repeat the same. Left forearm of the injured lady had been amputated because of fire shot injuries who was an unmarried girl of 19/20 years of age and had been permanently disabled for the rest of her life. Accused was convicted under Section 326, P.P.C. and sentenced to undergo seven years R.I. with fine and compensation payable to the injured lady in circumstances. 1995 P Cr. L J 1466.

Compromise : Injured person had forgiven the accused and had submitted a compromise deed in the Court. Injuries sustained by victim were simple. Accused had already

undergone sufficient imprisonment. Conviction of accused was maintained accordingly but his sentence of five years' R.I. was reduced to the period of imprisonment already undergone by him with reduction in fine in circumstances. **1997 M L D 2443.**

Injured prosecution witness had deposed that he had forgiven the accused in the name of God and that he had no objection if the accused was acquitted. Compromise entered into between the parties was genuine and without any duress and coercion. Accused was acquitted in circumstances. **1997 M L D 2700.**

Appeal against acquittal : Trial Court had acquitted the accused under Section 249-A, Cr.P.C. on the written arguments of the accused without hearing the prosecution side which order, even on this score, was not sustainable. Complainant, his son and his brothers-in-law being allegedly injured by the accused, *prima facie*, were natural witnesses and their statements could not be brushed aside summarily simply because of their relationship *inter se*. Order of acquittal, therefore, was not passed after due appreciation of evidence. Impugned order was consequently *set aside* and the case was remanded to Trial Court for fresh adjudication after examining the remaining witnesses. **1998 P Cr. L J 1467.**

Quashing of proceedings : Case was pending against the accused since 1989. Witnesses cited in the case were police officials who, despite coercive process having been issued against them, did not appear even on a single date of hearing. Prosecution consequently closed its case. Trial Court thereafter was not justified to issue bailable warrants for procuring the attendance of witnesses. Trial Court in circumstances was directed to record the statements of the accused under Section 342, Cr.P.C. and to provide them an opportunity of examining themselves on oath under Section 340(2), Cr.P.C. and to lead defence if so desired and thereafter to decide the case on merits. Petition was disposed of accordingly. **1997-M L D 1741.**

308. Punishment in qatl-i-amd not liable to qisas, etc. : (1) Where an offender guilty of *qatl-i-amd* is not liable to *qisas* under Section 306 or the *qisas* is not enforceable under clause (c) of Section 307, he shall be liable to *diyat*:

Provided that, where the offender is minor or insane, *diyat* shall be payable either from his property or, by such person as may be determined by the Court:

Provided further that where at the time of committing *qatl-i-amd* the offender being a minor, had attained sufficient maturity of being insane, had a lucid interval, so as to be able to realize the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to fourteen years as *ta'zir*:

Provided further that, where the *qisas* is not enforceable under clause (c) of Section 307, the offender shall be liable to *diyat* only if there is any *wali* other than offender and if there is no *wali* other than the offender, he shall be punished with imprisonment of either description for a term which may extend to fourteen years as *ta'zir*.

(2) Notwithstanding anything contained in sub-section (1), the Court, having regard to the facts and circumstances of the case in addition to the punishment of *diyat*, may punish the offender with imprisonment of either description for a term which may extend to fourteen years, as *ta'zir*.

COMMENTS

Applicability of S. 308, P.P.C. : Section 308, P.P.C. can only be invoked when accused is found to be guilty of Qatl-i-Amd but he is not liable to Qisas under Section 306, P.P.C. or the Qisas is not enforceable under clause. (c) of Section 307, P.P.C. Section 308, P.P.C., even if applicable, cannot be applied until first the accused is found guilty of Qatl-i-Amd, under Section 302, P.P.C. Provisions of Section 308, P.P.C. are to apply through their own force when the case falls under the provisions of Section 306, P.P.C., or Section 307 (c), P.P.C., which are to be read together with Section 302, P.P.C. and not in isolation. **1998 S C M R 1771.**

Scope : Case not found to be covered by Afw provisions contained in Section 308, can be decided by resort to Section 302(c) if all Walis of victim do not grant Afw to offender. **N L R 1993 Criminal 203.**

Sentence already undergone as convict and undertrial prisoner would meet ends of justice when occurrence took place 12 years back and convicts have undergone major part of their sentences. **1997 Cr. L J 454.**

Fine cannot be equated with compensation : Fine imposed alongwith sentence of death or imprisonment for life in a murder case under unamended Section 302, P.P.C., or under amended Section 308, P.P.C. cannot be equated with the amount of compensation payable to the legal heirs of the murdered deceased under Section 544-A, Cr.P.C. Court may order for payment of the amount of fine or part thereof to the legal heirs of the deceased, but under Section 544-A, Cr.P.C. Court is bound while convicting a person for the commission of murder or hurt or injury, etc., to award compensation to the legal heirs of the deceased or to the injured unless it records reasons in writing for not doing so. **1995 S C M R 176(I).**

Acquittal of accused : Entire evidence based on extra-judicial confession was not corroborated by medical evidence. Search having not been carried out in accordance with the mandatory provisions of Section 103, Cr.P.C., all the incriminating recoveries were highly dubious. Substantial contradictions in prosecution evidence had completely demolished the prosecution edifice. Defence version about the complainant party being equipped with motive for false implication of accused was not only based on certain admissions by the prosecution witnesses but defence evidence in this regard could not be dislodged by the prosecution. Accused was acquitted in circumstances. **1998 P Cr. L J 679.**

309. Waiver (Afw) (۞) of qisas in qatl-i-amd : In the case of *qatl-i-amd*, an adult sane *wali* may, at any time and without any compensation, waive his right of *qisas*:

Provided that the right of *qisas* shall not be waived--

- (a) where the Government is the *wali*; or
- (b) where the right of *qisas* vests in a minor or insane.

(2) Where a victim has more than one *Wali* any one of them may waive his right of *qisas*:

Provided that the *wali* who does not waive the right of *qisas* shall be entitled to his share of *diyat*.

(3) Where there are more than one victim, the waiver of the right of *qisas* by the *wali* of one victim shall not affect the right of *qisas* of the *wali* of the other victim.

(4) Where there are more than one offenders, the waiver of the right of *qisas* against one offender shall not affect the right of *qisas* against the other offender.

COMMENTS

Scope : Waiver (Afw) of Qatl-i-Amd under Section 309 and compounding of Qisas in Qatl-i-Amd under Section 310 (Sulh) would not be effective and binding on Court when compromise form was not signed by sole surviving heir of deceased and sole surviving heir of deceased had become insane and incapable to be Wali of deceased. Acquittal of charge under Section 302 recorded by Trial Court by accepting Afw merely because it had been filed before it set aside by High Court in exercise of its *suo motu* revisional jurisdiction under Section 435/439, Cr.P.C. and case for retrial of acquitted accused on charge of murder under Section 302 **N L R 1996 SD 697 (a) = 1997 P Cr. L J 247.**

Partial compromise : Out of the two, legal heirs of one deceased had forgiven the accused whereas legal heirs of the other deceased were not available and no compromise could, therefore, be effected in respect of the said other deceased. Application for accepting compromise in the matter and acquittal of accused was dismissed in circumstances. **1993 S C M R 1574.**

Right of Qisas, enforcement of : Provision embodied in Section 309 is not a complete Code in itself as it only lays down that Qisas right shall not be enforced against an offender who has been granted Afw by any Wali of victim and further that Walis who elect not to grant Afw to offender would be entitled to payment of their share to Diyat. Section 309 does not provide any consequences after grant of Afw by Wali and after payment of their share in Diyat to Walis who are not prepared to forgive offender. In such case, of necessity Injunctions of Islam would determine ultimate fate of an offender. These Injunctions are embodied in Section 302(c) which provides that where punishment by way of Qisas is not applicable, offender can be punished with imprisonment up to 25 years. **N L R 1993 Criminal 203.**

Qisas for Qatl-e-amd would not be enforceable in a case where one of Walis of victim grant Afw while other Walis do not grant Afw to offender. In such case, Walis who do not wave Qisas right would be entitled to share of Diyat. **N L R 1993 Criminal 203.** Right of waiver is a personal right and the same, therefore, cannot be exercised by the guardian. **1993 P Cr. L J 68.**

Sentence : Contention was that one of the Walis of the deceased having waived her right of Qisas under Section 309, P.P.C. a legal beneficial consequence had arisen in favour of the convicts which was not taken into consideration by the Courts below and that at best the Court could proceed under Section 311, P.P.C. The maximum punishment provided whereunder was imprisonment for a term which may extend to 10 years as Ta'zir. Leave to appeal was granted to examine the said contention and other related questions. **1994 S C M R 1327.**

According to the case of *State v. Mansoor Ali*, **1996 SD 697 (f) = 1997 PCr. LJ 247.** Court can convict/sentence accused for Tazir after accepting waiver (Afw) of Qatl-i-Amd.

Once a compromise is allowed, Court has no other option but to acquit the accused. **P L D 1995 Lah. 610.**

Father and mother of the deceased being his legal heirs had effected compromise with the accused voluntarily and had genuinely forgiven him in the name of Almighty Allah to lead their lives cordially in future. Compromise was accepted in circumstances and the accused was acquitted accordingly. **1997 P Cr. L J 99.**

Waiver or compounding of offences : With regard to waiver or compounding of offences Supreme Court laid down following guidelines for subordinate Courts and the citizens:-

- (i) in case of Qatl-i-Amd, if the right of Qisas is waived without any compensation, or compromise is arrived at between the parties i.e., accused and the adult legal heirs of the deceased, during the pendency of Trial, the application for permission to compound the offence shall be made before the Trial Court who shall determine all questions relating to waiver or compounding of an offence or awarding punishment under Section 310, P.P.C.
- (ii) In case of Qatl-i-Amd, if the right of Qisas is waived without any compensation or the legal heirs of the deceased compound their right of Qisas within the meanings of Sections 309 and 310 P.P.C., during the pendency of appeal, applications for permission to compound the offence shall be made before the Appellate Court, who shall determine all questions relating to waiver or compounding of an offence or awarding punishment under Section 310, P.P.C.
- (iii) Under Section 338-E(1), P.P.C., subject to the provisions of Chapter XLV and Section 345 of the Code of Criminal Procedure, all offences under Chapter XLV, P.P.C. relating to homicide and hurt may be waived or compounded and the provisions of Sections 309 and 310, P.P.C. shall, *mutatis mutandis*, apply to the waiver or compounding of such offences. So, if any offence under Chapter XLV affecting the human body is waived or compounded after the decision by the Trial Court or the decision of appeal, if any, an application for permission to waive or compound the offence shall lie before the Trial Court which shall determine all questions relating to the waiver or compounding of an offence or awarding of punishment under Section 310, P.P.C., and if the Trial Court is convinced that the waiver of right of Qisas or compounding of an offence punishable under Chapter XLV is genuine and in order, it shall acquit the accused.
- (iv) If a question arises as to whether any person is or is not the legal heir of the deceased, such question shall be determined by the Court competent to receive application on the basis of waiver or compromise between the parties.
- (v) For the purpose of determination of questions relating to the waiver of compounding of an offence, the accused and the legal heirs of the deceased shall be treated parties to the proceedings under Section 338-E(1), P.P.C. **P L D 1996 SC 178.**

Composition of offence : Heirs of the deceased had voluntarily granted "Afw" to the accused which could be acted upon. Nothing existed on record to punish the accused by way of "Taazir" under Section 311, P.P.C. Composition of offence was consequently allowed and accused was acquitted accordingly. **1997 M L D 2710.**

If an accused person has been awarded death sentence as Qisas, the same can only be undone under Section 309 or 310, P.P.C. If, however, the sentence is awarded by way of Ta'zir the Court has the power to grant permission to legal heirs of the deceased and the accused to compound the offence under Section 345(2), Cr.P.C. which will result in acquittal under Section 345(6), Cr.P.C. if the compromise is accepted by the Court. **1997 S C M R 1307.**

If the victim has more than one Wali and if any one of them waives his right, the right of Qisas cannot be enforced. Wali who has not waived or has not entered into Badl-i-Sulh will be entitled to receive his share of Diyat subject to Section 311, P.P.C. Where, however, accused person has been awarded sentence for murder as Tazir and not Qisas, the legal heirs cannot waive or accept Badl-e-Sulh. Sentence awarded for murder as Tazir can be compounded by all the legal heirs of the deceased with permission of the Court concerned. **1997 S C M R 1307.**

If the victim has more than one Wali and if any one of them waives his right, the right of Qisas cannot be enforced. The Wali who has not waived or has not entered into Badl-e-Sulh will be entitled to receive his share of Diyat subject to Section 311, P.P.C., under which it has been provided that notwithstanding anything contained in Section 309 or Section 310, where all the Wali do not waive or compound the right of Qisas or keeping in view the principle of Fasad-fil-arz, the Court may in its discretion having regard to the facts and circumstances of the case, punish an offender against whom right of Qisas has been waived or compounded with imprisonment of either description for a term which may extend to fourteen years as Ta'zir. Sub-section (2) of Section 309, proviso to Section 309(2), P.P.C. lays down that the Wali, who does not waive his right of Qisas, shall be entitled to his share of Diyat. There is no doubt that Section 338-F, P.P.C., provides that subject to the provisions of this Chapter and Section 345, of Cr.P.C., all offences under this Chapter may be waived or compounded and the provisions of Sections 309 and 310 shall *mutatis mutandis* apply to the waiver or compounding of such offences. The proviso to the same lays down that where offences have been waived or compounded, the Court may be its discretion having regard to the facts and circumstances of the case acquit or award Ta'zir to the offender according to the nature of the offence. The above section is to be interpreted in the light of the guideline for interpretation provided in Section 338-F, which enjoins that the Court, while interpreting and applying the provisions of the Chapter in question of the P.P.C., and in respect of matters ancillary or akin thereto, shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. This provision does not nullify the well-settled proposition of law that in case where as accused person has been awarded sentence for murder as Ta'zir and not Qisas, the legal heirs cannot waive or accept Badal-i-Sulh. However, in view of the amendment in Section 345(2), Cr.P.C. the sentence awarded for murder as Ta'zir can be compounded by all the legal heirs of the deceased with the permission of the Court concerned. **1997 S C M R 1307.**

Waiver and compounding of Qisas : Waiver (Afw) is completely different from compounding right of Qisas (Sulh); in the former the wali waives the right of Qisas without any compensation while in the latter the right of Qisas is compounded on receipt of compensation (Badal-i-Sulh). Where the Government is a wali or where right of Qisas vests in a minor or insane person no waiver (Afw) can be effected by the Government or the wali of the minor or insane person, but they can compound right of Qisas. **1993 S C M R 1574.**

Waiver or compounding of an offence in cases falling under Section 309 and compounding of Qisas (Sulh) in Qatl-e-amd is possible even in those cases of Qatl-e-amd where the right of Qisas cannot be enforced because the sentence of death has not been imposed and the lesser sentence granted under Section 302, P.P.C. in view of the provisions of Section 345, Cr.P.C. (as amended). **P L D 1991 S C 202.**

310. Compounding of qisas (Sulh) () in qatl-i-amd : (1) In the case of *qatl-i-amd*, an adult sane wali may, at any time on accepting *badl-i-sulh*, compound his right of *qisas*:

Provided that giving a female in marriage shall not be a valid *badl-i-sulh*.

(2) Where a wali is a minor or an insane, the wali of such minor or insane wali may compound the right of *qisas* on behalf of such minor or insane wali:

Provided that the value of *badl-i-sulh* shall not be less than the value of *diyat*.

(3) Where the Government is the wali, it may compound the right of *qisas*:

Provided that the value of *badl-i-sulh* shall not be less than the value of *diyat*.

(4) Where the *badl-i-sulh* is not determined or is a property or a right the value of which cannot be determined in terms of money under *Shari'ah* (), the right of *qisas* shall be deemed to have been compounded and the offender shall be liable to *diyat*.

(5) *Badl-i-sulh* may be paid or given on demand or on a deferred date as may be agreed upon between the offender and the *wali*.

Explanation : In this section, *Badl-i-sulh* means the mutually agreed compensation according to *Shari'ah* to be paid or given by the offender to a *wali* in cash or in kind or in the form of movable or immovable property.

COMMENTS

Accused more than one : Fact that three persons were involved in the murder was hardly of much importance when the heirs of the victim were satisfied with the amount of the *Diyat* being paid to them. **P L D 1991 S C 202.**

Giving of female in marriage : Only giving a female in marriage was not a valid *Badal-i-Sulh*. **1992 S C M R 1283.** District Magistrate had reported that convict had been pardoned in lieu of marriage of his two daughters with the sons of the deceased and payment of rupees two lacs in cash as compensation. Brother and two sons of deceased had authenticated the correctness of the compromise before the District Magistrate and had also acknowledged the receipt of rupees two lacs as compensation from accused party. State Counsel had urged nothing against the compromise. Compromise being genuine and requirements of law having been satisfied, Supreme Court accepted the compromise and ordered acquittal of the accused. **1992 S C M R 1283.**

Interest of minors : Interest of minors can be safeguarded by tendering the amount of *Diyat* payable to the minors, to their mother (when paternal grandfather was already dead), in Court by the convicts with the prayer that the amount payable to them may be paid to them in any manner considered suitable by it. **P L D 1991 S C 202.**

Offence, compounding of : Compounding of *Qisas* and compounding of offence are two separate terms. Compounding of offence is provided by Section 345, Cr.P.C. while compounding of *Qisas* is under Section 310, P.P.C. **1992 P Cr L J 1960.** Waiver or compounding of an offence in cases falling under Section 309 and compounding of *Qisas* (*Sulah*) in *Qatl-e-amd* is possible even in those cases of *Qatl-e-amd* where the right of *Qisas* cannot be enforced because the sentence of death has not been imposed and the lesser sentence granted under Section 302, P.P.C. in view of the provisions of Section 345, Cr.P.C. (as amended). **P L D 1991 S C 202.** Despite the fact that the offence was committed before the commencement of the Criminal Law (Second Amendment) Ordinance, 1990, offence committed in the case could be compounded on account of the provisions of Section 338-E read with Section 338-H, P.P.C. **P L D 1991 S C 202.**

According to the case of *Javaid Masih v. The State*, **1993 S C M R 1574**, the compounding of *Qisas* (*Sulh*) in cases of *Qatl-i-Amd* is possible even in those cases where the right of *Qisas* cannot be enforced because the sentence of death has not been imposed and lesser sentence granted under Section 302, P.P.C. Since compounding right of *Qisas* can be effected by the *Wali* of the deceased, care has to be taken to ascertain his correct identity and also to see that interest of the minor, if involved, is not prejudiced.

Compounding of Qisas (Sulh) in cases of Qatl-e-amd is possible even in those cases where the right of Qisas cannot be enforced because the sentence of death has not been imposed and lesser sentence granted under Section 302, P.P.C. Since compounding right of Qisas can be effected by the Wali of the deceased, care has to be taken to ascertain his correct identity and also to see that interest of the minor, if involved, is not prejudiced. 1993 S C M R 1574.

Right of Qisas, compounding of : Adult sane Wali may, at any time on accepting Badal-i-Sulah, compound his right of Qisas. P L D 1991 S C 202.

If an accused person has been awarded death sentence as Qisas, the same can only be undone under Section 309 or 310 P.P.C. If, however, the sentence is awarded by way of Ta'zir the Court has the power to grant permission to legal heirs of the deceased and the accused to compound the offence under Section 345(2), Cr.P.C. which will result in acquittal under Section 345(6), Cr.P.C. if the compromise is accepted by the Court. 1997 S C M R 1307.

If a case is covered by Section 302 (a), P.P.C. and death sentence has been awarded as Qisas, the Court cannot substitute the death sentence with that of imprisonment for life. In such a case the Wali of the deceased involved can either waive Qisas under Section 309, P.P.C. or he can compound under Section 310, P.P.C. 1997 S C M R 1307.

Compromise--Badal-i-Sulh: The District Magistrate had reported that convict had been pardoned in lieu of marriage of his two daughters with the sons of the deceased and payment of rupees two lacs in cash as compensation. Brother and two sons of the deceased had authenticated the correctness of the compromise before the District Magistrate and had also acknowledged the receipt of rupees two lacs as compensation from the accused party. State Counsel had urged nothing against the compromise. Compromise being genuine and requirements of law having been satisfied, the Supreme Court accepted the compromise and ordered acquittal of the accused. 1992 S C M R 1283.

311. Ta'zir after waiver or compounding of right of qisas in qatl-i-amd : Notwithstanding anything contained in Section 309 or Section 310, where all the wali do not waive or compound the right of qisas, or keeping in view the principle of *fasad-fil-arz* (فساد فی الارض), the Court may, in its discretion having regard to the facts and circumstances of the case, punish an offender against whom the right of qisas has been waived or compounded with imprisonment of either description for a term of which may extend to fourteen years as *ta'zir*.

Explanation : For the purpose of this section, the expression *fasad-fil-arz* (فساد فی الارض) shall include the past conduct of the offender, or whether he has any previous convictions, or the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience, or if the offender is considered a potential danger to the community.

COMMENTS

Applicability of Section : Section 311, P.P.C. is applicable in those cases where there is no compromise regarding the case as a whole and only right of Qisas is waived under Section 309, P.P.C. or if there is compounding right of Qisas under Section 310, P.P.C. then only the discretion provided under Section 311, P.P.C. becomes available. 1992 P Cr. L J 1960. Provisions of Section 311, P.P.C. will be attracted only when the Court has declined the permission for compounding of the offence under Section 345, Cr. P C. 1992 M L D 1590. Provision of Section 311, P.P.C. would be attracted only when the accused is to be convicted by way of Ta'azir in spite of waiver or compounding of the right of Qisas. 1993 P Cr. L J 1220.

Compounding/waiver of Qisas and compounding of offence are not identical and interchangeable as the authority to waive or compound the Qisas exclusively rests with the individual concerned but compounding of offence cannot be done without having the consent of the Court. Provisions contained in Section 311, P.P.C. cannot be read in isolation but are to be considered in the light of S. 345 (2) & (7), Cr.P.C. **P L D 1996 Quetta 56 (i).**

Section 311, P.P.C. provides for punishment as "Ta'azir" after waiver or compounding of right of "Qisas" in "Qatl-e-amd" under Section 309 and 310, P.P.C. respectively and it had no application to the case of "Qatl-e-amd" liable to "Ta'azir" and the composition of the said offence under Section 345, Cr.P.C. shall have the effect of an acquittal of the accused. **P L D 1992 Pesh. 176.** Provisions of Section 311, P.P.C. cannot be invoked in regard to cases pending before any Court immediately before the commencement of the Criminal Law (Second Amendment) Ordinance, 1990 or to the offences committed before such commencement. **1992 M L D 2368.**

Offender : Offender in Section 311, P.P.C. shall mean a person who has committed the offence. Question of waiver or compounding of the right of 'Qisas' would only arise after the accused is proved guilty. **P L D 1992 Pesh. 187.**

Compromise : Father of the deceased alone being competent to compound the offence, direction of Trial Court for procuring confirmation from brother and sisters of the deceased was totally devoid of lawful authority. Impugned order was consequently *set aside* and Trial Court was directed to re-examine the compromise and pass fresh order keeping in view the provisions of Section 311, P.P.C. and the observations made by High Court in the case. Revision petition was disposed of accordingly. **P L D 1997 Quetta 17.**

Ta'azir : Incriminating facts and circumstances shall justify the award of punishment of imprisonment as Ta'azir after having same been put to the accused for his explanation and for that matter his examination under Section 342, Cr.P.C. was necessary. **P L D 1992 Pesh. 187.** Compromise brought about to put an end as enmity between parties. In such case imposition of Ta'azir punishment would not be called for. **N L R 1992 U C 443.** Punishment of "Ta'azir" after waiver or compounding of right of "Qisas" in "Qatl-e-amd" can be awarded by the Court in its discretion having regard to the facts and circumstances of the case forming part of the record. **P L D 1992 Pesh. 176.** Prerequisites for the award of punishment as Ta'azir stated. **P L D 1992 Pesh. 187.**

In case of waiver or compounding of right of "Qisas" in "Qatl-e-amd", Ta'azir punishment cannot be awarded to the offender for an offence of 'Qatl-e-amd' committed by him before the commencement of Ordinance, VII of 1990 since Section 311, P.P.C. has not been given retrospective effect. **P L D 1992 Pesh. 187.** Court is not divested of power to punish offender as Tazir in spite of pardon and omission. Such power would be exercised where commission of offence had simultaneously posed a threat to collective peace and tranquillity. **1991 M L D 1864.** Trial Court on the one hand had accepted the compounding of the offence and on the other hand had punished the accused with imprisonment as Ta'azir. Judgment of Trial Court was consequently *set aside* and the case was remanded for fresh trial in accordance with law. **P L D 1992 Pesh. 187.**

Accused was directly charged for the commission of the offence. Crime weapon i.e., bloodstained stick had been recovered from the house of accused. Medical report had affirmed the factum of death of the deceased through blunt weapon like a stick. Accused had admitted his guilt before Magistrate as well as before Trial Court. Trial Court, in circumstances,

had rightly held the accused guilty of the charge and sentenced him to the punishment of Diyat under Section 331, P.P.C. after taking into consideration sudden fight between the accused and the deceased as a mitigating circumstance in his favour. Accused who due to non-payment of the amount of Diyat was undergoing simple imprisonment in jail was, however, entitled to be released on bail under Section 331, P.P.C. Accused, therefore, was ordered to be released on bail on furnishing security equivalent to the amount of Diyat amounting to Rs. 2,40,000 with two sureties each in the like amount to the satisfaction of Trial Court with the direction to pay the Diyat amount in three yearly instalments. **1998 PCr. LJ 1781.**

Ta'azir after waiver or compounding of right of Qisas in Qatl-i-Amd : Case against accused under Section 302/34, P.P.C. stood proved beyond reasonable doubt on the basis of evidence on the record. Trial Court by not acquitting the accused pursuant to the compromise effected between the only legal heir (father) of the deceased and the accused had committed no irregularity or illegality and had rightly exercised its discretion in the circumstances of the case in convicting and sentencing the accused under Section 311, P.P.C. Conviction and sentence of accused were upheld accordingly. **P L D 1995 Lah. 604.**

According to the Case of *Muhammad Akbar v. State*, **P L D 1996 Quetta 56 (a)**, Conviction can be awarded under Section 311, P.P.C. in case of waiver of Qisas and even after execution of a compromise.

312. Qatl-i-amd after waiver or compounding of qisas : Where a *wali* commits *qatl-i-amd* of a convict against whom the right of *qisas* has been waived under Section 309 or compounded under Section 310, such *wali* shall be punished with--

- (a) *qisas*, if he had himself, waived or compounded the right of *qisas* against the convict or had knowledge of such waiver of composition by another *wali*, or
- (b) *diyat*, if he had no knowledge of such waiver or composition.

313. Right of qisas in qatl-i-amd : (1) Where there is only one *wali*, he alone has the right of *qisas* in *qatl-i-amd* but, if there are more than one, the right of *qisas* vests in each of them.

(2) If the victim--

- (a) has no *wali*, the Government shall have the right of *qisas*; or
- (b) has no *wali* other than a minor or insane or one of the *wali* is a minor or insane, the father or if he is not alive the paternal grandfather of such *wali* shall have the right of *qisas* on his behalf:

Provided that, if the minor or insane *wali* has no father or paternal grandfather, howhighsoever, alive and no guardian has been appointed by the Court, the Government shall have the right of *qisas* on his behalf.

COMMENTS

Accused more than one : Offence of Qatl-e-amd committed by three offenders whereas victim was a single individual. Fact that three persons were involved in the murder was hardly of much importance when the heirs of the victim were satisfied with the amount of the Diyat being paid to them. **P L D 1991 S C 202.**

Interest of minors, safeguarding of : Interest of minors could be safeguarded by tendering the amount of Diyat payable to the minors, to their mother (when paternal-grandfather was already dead), in Court by the convicts with the prayer that the amount payable to them may be paid to them in any manner considered suitable by it. **P L D 1991 S C 202.**

314. Execution of qisas in qatl-i-amd : (1) *Qisas* in *qatl-i-amd* shall be executed by a functionary of the Government by causing death of the convict as the Court may direct.

(2) *Qisas* shall not be executed until all the *wali* are present at the time of execution, either personally or through their representatives authorised by them in writing in this behalf:

Provided that where a *Walis* or his representative fails to present himself on the date, time and place of execution of *qisas* after having been informed of the date, time and place as certified by the Court, an officer authorised by the Court shall give permission for the execution of *qisas* and the Government shall cause execution of *qisas* in the absence of such *wali*.

(3) If the convict is a woman who is pregnant, the Court may, in consultation with an authorised medical officer, postpone the execution of *qisas* upto a period of two years after the birth of the child and during this period she may be released on bail on furnishing of security to the satisfaction of the Court, or, if she is not so released she shall be dealt with as if sentenced to simple imprisonment.

COMMENTS

Qisas—Execution of : *Qisas* is to be executed by a functionary of the Government. **P L D 1996 SC 1 (e).**

315. Qatl shibh-i-amd : Whoever, with intent to cause harm to the body or mind of any person, causes the death of that or of any other person by means of a weapon or an act which in the ordinary course of nature is not likely to cause death is said to commit *qatl shibh-i-amd*.

Illustration

A in order to cause hurt strikes Z with a stick or stone which in the ordinary course of nature is not likely to cause death. Z dies as a result of such hurt. A shall be guilty of *qatl shibh-i-amd*.

COMMENTS

Common intention : Where the deceased in the case had died of head injury caused by reverse side of hatchet blow by one accused and Sota blow by the other accused, the accused giving hatchet blow had committed *Qatl-e-amd* and the one giving Sota blow *Qatl-e-Shibh-e-amd*; both accused could not be said to have shared common intention as premeditation to commit the offence had not been proved. Each of the accused persons, therefore, was to be punished for the offence committed by him. **P L D 1994 Lah. 442.**

Acquittal on benefit of doubt : Non-production of the most natural and independent witness of the occurrence by the prosecution had led to the only presumption that he was not supporting the prosecution case. Complainant and his son who claimed to be eye-witnesses were not sure about the actual culprit or the manner in which the occurrence initiated and culminated. All the persons named in the F.I.R. had been declared innocent by the police and the person who was not seen at the spot nor named in the F.I.R. had been saddled with the

murder of the deceased. Defence version being nearer to the truth was acceptable. Accused was acquitted on benefit of doubt in circumstances. **1998 P Cr. L J 1384.**

316. Punishment for qatl shibh-i-amd : Whoever commits *qatl shibh-i-amd* shall be liable to *diyat* and may also be punished with imprisonment of either description for a term which may extend to fourteen years as *ta'zir*.

COMMENTS

Pre-existing heart ailment of the deceased which rendered the blow dangerous to life due to his fall, was not in the knowledge of the accused. Prosecution having failed to prove the requisite intention on the part of the accused to burden him with the responsibility under Section 316, P.P.C. he could not be convicted thereunder. Injury caused by the accused to the deceased fell within the ambit of Section 337-A(i), P.P.C. Accused's conviction under Section 316, P.P.C. was altered to one under Section 337-A(i), P.P.C. and sentenced to imprisonment already undergone by him. **1995 P Cr. L J 1807.**

Accused was directly charged for the commission of the offence. Crime weapon i.e., bloodstained stick had been recovered from the house of accused. Medical report had affirmed the factum of death of the deceased through blunt weapon like a stick. Accused had admitted his guilt before Magistrate as well as before Trial Court. Trial Court, in circumstances, had rightly held the accused guilty of the charge and sentenced him to the punishment of *Diyat* under Section 331, P.P.C. after taking into consideration sudden fight between the accused and the deceased as a mitigating circumstance in his favour. Accused who due to non-payment of the amount of *Diyat* was undergoing simple imprisonment in jail was, however, entitled to be released on bail under Section 331, P.P.C. Accused, therefore, was ordered to be released on bail on furnishing security equivalent to the amount of *Diyat* amounting to Rs. 2,40,000 with two sureties each in the like amount to the satisfaction of Trial Court with the direction to pay the *Diyat* amount in three yearly instalments. **1998 P Cr. L J 1781.**

317. Person committing qatl debarred from succession : Where a person committing *qatl-i-amd* or *qatl shibh-i-amd* is an heir or a beneficiary under a will, he shall be debarred from succeeding to the estate of the victim as an heir or a beneficiary.

318. Qatl-i-khata : Whoever, without any intention to cause death of, or cause harm to, a person causes death of such person, either by mistake of act or by mistake of fact, is said to commit *qatl-i-khata*.

Illustrations

- (a) A aims at a deer but misses the target and kills Z who is standing by A is guilty of *qatl-i-khata*.
- (b) A shoots at an object to be a boar but it turns out to be a human being. A is guilty of *qatl-i-khata*.

COMMENTS

Qatl-i-Khata : Ingredients of this offence are :

- (a) causing death of a human being;
- (b) unintentionally;
- (c) by mistake of fact; or
- (d) by mistake of act.

The punishment of *Diyat* in the offence of *Qatl-i-Khata* is obligatory while the offender may be awarded the sentence of imprisonment if the act was rash and negligent. The essence of the offence of *Qatl-i-Khata* is that *mens rea* in no case can be contemplated.

319. Punishment for qatl-i-khata : Whoever commits *qatl-i-khata* shall be liable to *diyat* :

Provided that, where *qatl-i-khata* is committed by any rash or negligent act, other than rash or negligent driving, the offender may, in addition to *diyat*, also be punished with imprisonment of either description for a term which may extend to five years as *ta'zir*.

COMMENTS

Scope : Apart from the private complaint under S. 302, P.P.C., there was a separate challan case under S. 319, P.P.C. Trial in the complaint case having almost concluded, if the accused was convicted for offence under S. 302, P.P.C. prosecution would not be interested to pursue the challan case under S. 319, P.P.C., but in case of acquittal of the accused under S. 302, P.P.C. there was every likelihood of his second trial for the offence under S. 319, P.P.C. which would be violative of the provisions of Art. 13 of the Constitution and S. 403, Cr.P.C. Trial Court, therefore, was directed to keep the complaint case pending and to commence proceedings in the challan case under S. 319, P.P.C., record evidence of the parties and thereafter decide the two cases simultaneously so as to avoid two contradictory judgments. **1997 P Cr. L J 1771 (b).**

Sentence, reduction in : Case of the accused was covered by second part of Section 304, P.P.C. as they did not intend to cause death of the deceased, but that the knowledge that in forcibly driving away the vehicle his death was likely to be caused. Sentence of imprisonment of the accused was accordingly reduced to seven years' R.I. with reduction in fine. **1993 P Cr. L J 417.**

The eye-witnesses, although closely related to deceased, had no motive to falsely implicate the accused. Ocular account stood corroborated by medical evidence, recovery of blood-stained dagger at the instance of the accused and the evidence of motive. Conduct of deceased in leaving the hospital against the medical advice, however, had also contributed to his death. Doctor who conducted autopsy did not say that the injuries suffered by deceased were sufficient in the ordinary course of nature to cause death. The conviction of the accused under Section 302, P.P.C. was altered to Section 304, Part II, P.P.C. in circumstances and he was sentenced to 10 years' R.I. with fine. **P L D 1993 Lah. 293.**

Appreciation of evidence : The eye-witness had no enmity with the accused and his testimony was fully corroborated by medical evidence. The prosecution had, thus, proved its case against the accused beyond reasonable doubt. The conviction of accused and his sentence to pay the *Diyat* money were consequently maintained with reduction in his sentence of imprisonment awarded as *Taazir*. **1992 P Cr. L J 1583.**

Deceased lady was admittedly unmarried but as per medical evidence who was pregnant of about 3/4 months and sexual intercourse had taken place with her even before the occurrence. Loin-clothes of both the deceased were also not seen on their bodies by the investigator. Plea of the accused of having killed both the deceased on grave and sudden provocation was, thus, established on record. The conviction of the accused was consequently maintained, but sentence of ten years' R.I. awarded to him on each count was reduced to five years' R.I. in circumstances. **1993 P Cr. L J 1696.**

320. Punishment for qatl-i-khata by rash or negligent driving : Whoever commits *qatl-i-khata* by rash or negligent driving shall, having regard to the facts and circumstances of the case, in addition to *diyat*, be punished with imprisonment of either description for a term which may extend to ten years.

COMMENTS

Scope : Punishment for "Qatl-i-Khata" by rash or negligent driving is dependent upon the proof of rash or negligent driving within the meaning of Section 320, P.P.C. **1995 M L D 1775.**

Injury or death of occupants or/and passengers of a driven vehicle will not be covered by mischief of Section 320, P.P.C. **1995 M L D 1775.**

Rash or negligent act : Homicide by a rash and negligent act is the fourth offence affecting human life and is closely connected with the third form of culpable homicide under Section 299. This section deals with causing of death by a rash or negligent act. It is one of those sections which apply only to acts which are not criminal in themselves but are punishable by reason of death having been caused.

Here speeding of the vehicle does not constitute rash and negligent act.

In assessing rashness or negligence in the case of horse-driven carriages due consideration should be given to the fact that unlike motor vehicles such carriages cannot be stopped dead on mere application of brakes. **P L D 1965 Pesh. 104.**

Culpable negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. It is a gross and culpable negligence to fail to exercise that reasonable and proper care and caution which a person should have taken to guard against the injury to the person present nearby. **P L D 1965 Pesh. 608.** Where the accused being tempted to play with a revolver pulled its trigger without taking the precaution of seeing that it was empty and thereby caused the death of a person standing facing the revolver, it was *held that* the accused was guilty under Section 304-A, P.P.C. **P L D 1959 Lah. 655.**

Prosecution of a driver for causing hurt, simple or grievous or death of a person, by rash and negligent driving, the vehicle cannot be said to have been used by the accused for the commission of the said offence. **1995 P Cr. L J 608.**

Rash and negligent driving : The conviction under Section 304-A can be recorded only when it can be positively shown by evidence that the applicant has been rash and negligent in the performance of the act which is the direct cause of the result, i.e., death of any person. In a case where such a link between the act and the death of the person could not be shown to exist the accused would always be entitled to the benefit of doubt. **1975 P Cr. L J 813.**

Word "driving" in its application under Section 320, P.P.C. is limited to a person or persons on road on the rule of intendment of Legislature making specific provisions for facts and circumstances of the case and not to animals on the road. **1995 M L D 1775.**

Not the high speed of a vehicle but a rash and negligent act on the part of the driver constitutes the offence. **P L D 1997 Pesh. 13 (b).**

A man driving at a speed of 70 miles an hour on a clear road, would not be rash and negligent, but that cannot be said about the same person even at a speed of 20 miles an hour, in another situation. In the instant case the applicant should have realised that he was on the outskirts of a town and the road was not totally deserted. All the same he was driving at speed

and the prosecution evidence is that the accident took place while he was on the wrong side of the road. **P L D 1975 Kar. 723; P L J 1975 Cr.C. (Kar.) 600.**

The accused a truck driver reversed the truck rashly and crushed to death a boy of tender age. The accused if at all had taken due care and caution the accident could have been avoided. The accused appellant was rightly convicted but considering his having remained imprisoned ever since his conviction and had already undergone 9 months' imprisonment, sentence already undergone was sufficient to meet ends of justice. The sentence of imprisonment was reduced to one already undergone in circumstances. **P L D 1982 S C 280.**

The accused's jeep struck against the complainant's rickshaw, toppled it over, and then had got out of control striking against a passerby injuring him seriously and resulting in his death. Latter incident was accidental and accused could not at such stage be capable to fully and effectively control his jeep, however, well he may have tried to control situation as a reasonable and prudent man would have attempt in circumstances. It was reasonable view to be taken for the purpose of sentence in the circumstances of the case. The sentence of seven years' R.I. was reduced to period of fifteen months' detention already undergone by accused. **P L D 1982 Lah. 171.**

There was no *prima facie* evidence that the accused was sitting in truck and urging or egging driver to drive rashly or negligently. The accused had not abetted offence or committed the offence in the same transaction. Coupling accused with driver vitiated trial on grounds of misjoinder of charges. The accused's trial under Section 112 of Ordinance had to be separate. **1983 PCr.LJ 1298.**

Ox alleged to have been run over by the vehicle seemed to have been either tied on the road or it was suddenly crossing the road. Complainant's statement regarding the rash or negligent driving of the vehicle was his own judgment of the driving because of the death of his ox. Prosecution has failed to prove the rash or negligent driving of the vehicle by the accused and also "Qatl-i-Khata" of a person by him on the road. Accused was acquitted in circumstances. **1995 M L D 1775.**

Acquittal on benefit of doubt : Accused was not arrested at the spot. No identification parade had been held for the identification of accused. Owner of the tractor trolley under the wheels of which the pedestrian was crushed to death was not examined in Court. Statement of accused under Section 342, Cr.P.C. to the effect that on the day of occurrence he was not driving the tractor trolley as he had already given up the job as tractor driver on account of some differences with the owner of the tractor, who had got him falsely involved in the case, could not be disbelieved in the circumstances particularly when the said statement of accused was supported by defence evidence. No cogent evidence being available on record to positively connect the accused with the commission of the offence, he was acquitted on benefit of doubt. **1998 PCr. LJ 1584.**

321. Qatl-bis-sabab : Whoever, without any intention to cause death of, or cause harm to, any person, does any unlawful act which becomes a cause for the death of another person, is said to commit *qatl-bis-sabab*.

Illustration

A unlawfully digs a pit in the thoroughfare, but without any intention to cause death of, or harm to, any person, B while passing from there falls in it and is killed. A has committed *qatl-bis-sabab*.

COMMENTS

Qatl-bis-Sabab : The essential ingredients of the offence are :

- (a) causing death of a human being;
- (b) unintentionally;
- (c) by doing of an unlawful act; and
- (d) that unlawful act becomes the cause of the death.

Qatl-bis-Sabab is punishable with Diyat.

Different types of Qatls : Apart from two similarities between different types of Qatls, they are in no way identical. The two similarities are that in every Qatl it is essential that death of a human being is caused, while the second similarity relates to consequences, i.e., Diyat is applicable in every type of Qatl. Although in Qatl-i-amd it is not necessary in all cases but at least in some cases of Qatl-i-amd, Diyat is made obligatory. In all other Qatls, the punishment of Diyat is mandatory. The differences between different Qatls are :

1. Qatl-i-amd is committed intentionally or with knowledge of causing death.
In Qatl Shihb-i-amd, the offender has not intended the death but he intended any other bodily harm which caused the death.
Qatl-i-khata is committed unintentionally and due to mistake. Qatl-bis-sabab is wholly unintentional.
2. *Mens rea* is an essential ingredient in cases of Qatl-i-amd and Qatl-Shihb-i-amd. While in the remaining two cases *mens rea* cannot be contemplated.
3. The difference between Qatl-i-khata, and Qatl-bis-Sabab is in causation. In Qatl-i-khata, cause of the death is the direct act of the offender while in Qatl-bis-sabab cause of death is not due to the direct act of the offender but another unlawful act should intervene, and that intervening act should become the cause of the death of victim.
4. One other difference relates to consequences. The difference lies in the difference of the degree of punishment. This aspect should also be remembered that the punishment of Qisas is only applicable in case of Qatl-i-amd. While the accused guilty of Qatl-bis-sabab is liable only for the Diyat. In cases of Qatl Shihb-i-amd and Qatl-i-khata, Diyat is mandatory while punishment of imprisonment may also be awarded as Tazir.

322. Punishment for qatl-bis-sabab : Whoever commits *qatl-bis-sabab* shall be liable to *diyat*.

COMMENTS

Common Intention : Where the deceased in the case had died of head injury caused by reverse side of hatchet blow by one accused and Sota blow by the other accused the accused giving hatchet blow had committed Qatl-e-amd and the one giving Sota blow Qatl-i-Shihb-i-amd; both accused could not be said to have shared common intention as premeditation to commit the offence had not been proved. Each of the accused persons, therefore, was to be punished for the offence committed by him. **P L D 1994 Lah. 442.**

Offence of 'Hurt' : 'Hurt' is harm caused to human body other than death. The essential ingredients of hurt are:

- (a) causing to any person;
- (b) pain, harm, disease, infirmity or injury;

- (c) impairing, disabling, or dismembering any organ of the body; or
- (d) without causing the death.

Previously two kinds of hurt were provided in a consolidated form, whereas in the substituted provisions five kinds of hurt are provided wherein various organs and parts of human body have been separately defined.

Different kinds of hurt : There are five major kinds of hurt provided in the Ordinance. They are being dealt with one by one along with their sub-categories.

323. Value of diyat : (1) The Court shall, subject to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and keeping in view the financial position of the convict and the heirs of the victim, fix the value of *diyat* which shall not be less than the value of thirty thousand six hundred and thirty grams of silver.

(2) For the purpose of sub-section (1), the Federal Government shall, by notification in the official Gazette, declare the value of silver, on the first day of July each year or on such date as it may deem fit, which shall be the value payable during a financial year.

COMMENTS

Diyat, value of : Court was required to fix the value of Diyat keeping in view the financial position of the convicts and heirs of the victim provided that the amount so fixed was not less than the value of thirty thousand six hundred and thirty grams silver. Not only that the heirs of the deceased desired to compound the offence and end their differences but a sum of Rs. 1.71 000 was to be paid to the heirs of the victim as Badal-i-Sulah by the convicts. **P L D 1991 S C 202; 1992 P Cr. L J 1583.**

Sentence : The accused had undergone the agony of protracted trial and had remained in custody for some days after conviction. The sentence of six months' R.I. awarded to the accused was reduced to term of imprisonment already undergone by them in circumstances. **1992 M L D 1490.**

Compromise : The complainant who had been injured by the accused in the occurrence had compounded the offences of which the accused had been convicted. The compromise reached between the parties was voluntary and of their free will. The composition of the offences was permitted and the accused were acquitted in circumstances. **1992 P Cr. L J 1436.**

Appeal against acquittal : The eye-witness had stated that the accused was armed with rifle but no bullet injury fired from rifle was found on deceased. Such variation between the ocular account and the medical evidence was sufficient to confer benefit of doubt on the accused and he was held to have been rightly acquitted by the Trial Court. **1993 P Cr. L J 1025.**

Appreciation of evidence : The eye-witnesses no doubt were related to the deceased, but their evidence could not be shaken despite lengthy cross-examination and they could not be said to have spared the real culprits and involved innocent persons. Ocular evidence was natural and reliable. Conviction of the accused was maintained in circumstances. **1992 M L D 1490.**

Constitutional petition : Remission of unexpired sentence of imprisonment of accused by Provincial Government in terms of Section 401, Criminal Procedure Code, 1898. Validity. Powers conferred upon Provincial Government under Section 401, Criminal Procedure Code, 1898 were although discretionary, yet discretion when and wherever provided in Statute, could not be equated to that of unfettered and unbridled powers, but such discretion was to be exercised judiciously with care and caution and after diligent application of mind to all relevant

circumstances including nature of offence committed and ultimate decision of case. Discretion exercised by Provincial Government had been exercised in arbitrary manner without taking into consideration that accused had been convicted by Sessions Judge, whose appeal was dismissed by High Court and subsequently Supreme Court had refused to grant leave to appeal. Such aspect of matter having escaped unnoticed, had resulted in serious miscarriage of justice. Mechanical exercise of discretion carried out by Provincial Government, was, thus, not sustainable being unwarranted **1998 PCr. LJ 921.**

324. Attempt to commit qatl-i-amd : Whoever does any act with such intention or knowledge, and under such circumstances, that, if he by that act caused *qatl*, he would be guilty of *qatl-i-amd*, shall be punished with imprisonment for either description for a term which may extend to ten years, and shall also be liable to fine, and, if hurt is caused to any person by such act, the offender shall, in addition to the imprisonment and fine as aforesaid, be liable to the punishment provided for the hurt caused:

Provided that, where the punishment for the hurt is *qisas* which is not executable, the offender shall be liable to *arsh* and may also be punished with imprisonment of either description for a term which may extend to seven years.

COMMENTS

Attempt to commit murder : It is not always necessary that in order to constitute an offence of attempt to commit Qatl-i-Amd injuries should be such as would eventually entail the death of the injured person. Factum of fire-arm injuries by itself would reflect the conduct and intention of the assailant giving rise in all probability to a justifiable inference that by act of firing he intended to do away with the life of the injured person in an unnatural manner. **1998 M L D 1400.**

Jurisdiction : Offences under Sections 324 to 338-C, P.P.C. entail the punishment of Qisas, payment of Diyat, Arsh, Daman which are the principal punishments for the offences, but the Magistrate 1st Class as per Section 32, Cr.P.C. has no power to impose such punishments and, therefore, such sentences passed by him would be deemed to be illegal and without jurisdiction. To remove this anomaly Section 32, Cr.P.C. requires amendment in the light of the punishments provided for the said offences or the offences should be made either triable by a Court or Session of Magistrate 1st Class having powers under Section 30, Cr.P.C. **P L D 1993 Pesh. 22.**

Mens rea : Existence or non-existence of specific *mens rea* is a crucial factor in case of attempt to commit 'Qatl-e-amd'. **P L D 1992 Pesh. 125.**

Nature of offence : Accused were found to have a motive to attack the victim who had received seven injuries on his person. Accused, therefore, were culpable and punishable not for attempt to commit Qatl-e-amd but for the injuries actually caused by them to the victim. Victim had received five stab wounds involving cutting and incising the flesh without exposing any bone and without extending to the body cavity of the trunk which was punishable under Section 337-F(ii), P.P.C. Firm-arm injuries suffered by the victim fell within the purview of sub-clause (iii) of Section 337-F, P.P.C. Conviction and sentences of the accused under Section 324-34, P.P.C. were consequently set aside and instead they were convicted under Sections 337-F(ii)/34 and 337-F(iii)/34, P.P.C. and sentenced accordingly. **1993 P Cr. L J 1760.**

Sentence : Punishment cannot be awarded for the injuries of those injured who do not appear at the trial nor account for their absence satisfactorily. Conviction under Qisas and sentence cannot be awarded for the injured who appear at the trial but are not able to name

their assailants. **1992 S C M R 2037; 1992 S C M R 2088.** Where injured witnesses had appeared at the trial and stated about their injuries. Conviction and sentence awarded to accused under Section 324/34, P.P.C. were maintained with an additional order under Section 544-A Cr.P.C. **1992 S C M R 2037.**

Attempt at Qatl-e-amd had been equated in Section 324, P.P.C. to actual Qatl-e-Amd which had been defined in Section 300, P.P.C. and for which sentence had been provided in Section 302, P.P.C. Again if by such act no hurt is caused the sentence is up to ten years with fine but if some hurt is actually caused that would be covered by Sections 337-A and 337-F, P.P.C. for which the sentence to be awarded is much less. No logic or coherence, thus, seemed to exist in the two provisions of Section 324, P.P.C. Attention of the Ministry of Justice, Law and Parliamentary Affairs, Government of Pakistan was consequently invited to the provisions of Section 324, P.P.C. to have a second look and streamline the law. **P L D 1994 Lah. 344.**

Sentence. Enhancement of : Sentence of two years' R.I. awarded to each accused having erred on the side of leniency in the attending circumstances, was enhanced to five year, R.I. Since the complainant had lost his one eye, accused were liable under Section 337-R, P.P.C. and they were directed to pay one-half of the Diyat amount each to the complainant instead of Rs. 5,000 each as "Daman". **1998 PCr. LJ 1009.**

Conviction : The punishment cannot be awarded for the injuries of those injured who do not appear at the trial not account for their absence satisfactorily. The conviction under Qisas and sentence cannot be awarded for the injured who appear at the trial but are not able to name their assailants. **1992 S C M R 2037.**

Each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision. **1995 P Cr. L J 1727.**

An intent *per se* is not an attempt. Intent implies purpose and attempt is an actual effort made in execution of the purpose. From the steps directed towards the objective sought the criminal intent must be logically inferable. The attempt for the purposes of this section should stem from a specific intention to commit murder and this blameworthy condition of mind may be gathered from director circumstantial evidence including the conduct of the accused.

This section lays stress on the intention or knowledge of the accused. It is not necessary that the victim should receive hurt. All that is necessary is that the accused should have the intention to commit murder or he should have knowledge that he is likely to cause death. In order to constitute an offence under this section it must be established that the offender did an act and that in doing that act he was actuated by an intention to murder someone.

Where the accused was incriminated for attacking the prosecution witness with a dagger and inflicted three blows on him causing two injuries on his neck and one on the right jaw. The accused was charged under Section 307, P.P.C., but the conviction was altered to Section 324, P.P.C. by the High Court. On appeal to the Supreme Court while delivering judgment the following observations were made :--

"As a matter of fact we are of the view that the offence made out by the evidence on the record falls under Section 307, P.P.C. and the reasons given by the learned Judge in Chamber for reducing the offence by altering conviction from 307, P.P.C. to 324, P.P.C. are wholly untenable. The petitioner gave repeated dagger blows to Ghulam Sarwar (P.W.) which were aimed at his neck, a very delicate and valuable part of the human body. It is the victim's sheer good luck that he survived. Had he died the offence would have obviously fallen under Section 302, P.P.C. If the State or the complainant had filed a petition it could have succeeded. **P L D 1983 S C 32.** Where the deceased first abused the accused in a very filthy language as "Here is your mother and now we are taking away your mother for whom you had been trying". The pungency of abuse was considered enough to what the feeling of anyone to whom such provocative words are addressed. The appellant was held to have a right to protect his person but the complainant party being unarmed, he had no justification to fire twice at the deceased.

He exceeded the right of self-defence in the circumstances. Order of conviction under Sections 302 and 307, P.P.C. was *set aside* and the appellant convicted under Section 304, Part 1, P.P.C. **1983 P Cr. L J 238.**

The prosecution witnesses did not see the accused at the spot at time of the occurrence. The injury on the nose of the complainant was not noticed by the doctor on medical examination. The accused was allegedly armed with shovel and if blow had been given with shovel, it would have caused very grievous injury to the nose and not only a bruise. No evidence was produced by the prosecution as to what happened to shovel after the occurrence. The prosecution failed to either prove presence of the accused at the spot or his taking part in fight. **P L D 1984 Pesh. 192.**

Sentence, reduction in : None from the police party was injured in the police encounter. Sentence of seven years' R.I. awarded to the accused in the circumstances was reduced to five years' R.I. with reduction in fine as well as the benefit under Section 382-B, Cr.P.C. **1993 P Cr. L J 1722.**

Appeal against acquittal : Plea raised by the accused of having acted under grave and sudden provocation at the time of occurrence was spelt out from the evidence on record and the circumstances appearing in the case. Appeal against the acquittal of the accused by the Trial Court was dismissed in circumstances. **1993 P Cr. L J 1780.**

The ocular evidence was credible, consistent, unshaken and confidence inspiring and was corroborated by medical evidence and other circumstantial evidence like recovery of empties from the place of incident and recovery of pistol at the pointation of the accused. Charge under Section 307, P.P.C., thus, had been proved against the accused on the record. The accused was consequently convicted under Section 307, P.P.C. and sentenced to suffer ten years' R.I. with fine thereunder. **1993 P Cr. L J 255.**

The parties had entered into a compromise and the accused had compensated the complainant party. Both the parties had also agreed to withdraw all litigation *inter se* and the purpose of administration of criminal law to maintain peace and tranquillity had been achieved. Appeal was also incompetent as not having been filed in accordance with law, i.e., Section 13(5) of the Ordinance. Contention that the parties could neither compromise, nor the trial Court could accept the same and acquit the accused, had, no force. Appeal against the acquittal was dismissed in circumstances. **1993 P Cr. L J 152.**

No misreading of evidence on record by the trial Court acquitting the accused could be pointed out. Finding of the High Court regarding eye-witnesses as to their being independent, disinterested and very natural seemed to be misconceived as two eye-witnesses were the son of the deceased and the third eye-witness was a chance witness. Defence plea also was not taken into account by the High Court. Order of the acquittal passed by the Trial Court was, therefore, not liable to be interfered with in view of the established law of long standing, lastly reported in the case of *Yar Muhammad and 3 others v. The State*. **1992 S C M R 96.** Appeals of the accused were consequently allowed restoring the order of acquittal passed by the Trial Court. **1993 S C M R 94.**

Complainant/victim who immediately after occurrence was rushed to hospital, had lodged report with a local police within 15 minutes and had named accused persons for effective firing at him. Accused were arrested within few minutes of incident after chase on a thoroughfare by a constable who happened to be on "Gasht" at that time. Doctor who examined complainant/victim declared injuries on person of complainant caused by fire-arm as dangerous to life. One of the accused persons had made an inculpatory confessional statement before Magistrate. Occurrence had arisen in the background of blood-feud enmity between parties. Pistols used in occurrence were taken into possession from accused immediately after the arrest alongwith empties. Guilt of accused persons which had been established beyond any reasonable doubt, was further corroborated by inculpatory confessional statement of one of the accused. Accused, in circumstances, *held*, were liable to

be convicted and punished under Section 324, P.P.C. as amended by Criminal Law (Second Amendment) Ordinance, XII of 1993 which prevailed at time of occurrence. **1998 P Cr. L J 619.**

Complainant party appeared to have roped in all those persons with whom they were having civil litigation. That a single woman aged 50 years would give hatchet blows to the injured witness and other accused of 70 years would wield a "Dang" in the presence of younger persons was not believable. Defence version was more plausible and inferable from the record. Accused had faced the agony of protracted trial for more than four years. Accused were extended benefit of doubt and acquitted in circumstances. **1998 P Cr. L J 1435.**

Complainant had given same statement in Court as was recorded by him in F.I.R. and that statement was supported by prosecution witnesses. Full opportunity was given to accused to cross-examine complainant and witnesses and even to produce his own witnesses in defence. Accused cross-examined complainant and prosecution witnesses, but no dent could be made in prosecution case. Ocular evidence and medical evidence fully testified prosecution case. Use of carbine in occurrence and inflicting of injuries on thigh and hand of victim had clearly shown that accused had the intention and knowledge that his act might cause fatal injuries to the victim. Guilt of accused having fully been established, his conviction was maintained, but accused having already undergone more than three years' imprisonment, sentence awarded to accused was altered to sentence already undergone by him. **1998 P Cr. L J 1425.**

Reference by Trial Judge for transfer of Challan case from his Court : The case no doubt had been entrusted to the Trial Court by the orders of the High Court but the situation which developed after the dismissal of the private complainant filed by the accused against the complainant through a detailed judgment and the Trial Court itself making reference seeking the transfer of the Challan case from its Court for entrustment of the same to any other Court, should have been brought to the notice of the High Court as the Trial Court had been nominated by the High Court. Order of the Sessions Court refusing the said reference was consequently set aside with the direction to the Sessions Court to forward the reference to the High Court for passing appropriate orders. **1993 P Cr. L J 758.**

Quashing of F.I.R. : Trial in the challan case being in progress and two witnesses having already been examined, making of any comments on the merits of the case at such a stage was not desirable as it could prejudice the trial itself. Prosecution had evidence to support the version given in the F.I.R. and had also collected circumstantial evidence such as recovery of the empties from the spot and the weapons used during the occurrence. Case, therefore, was fit for judicial test at the Trial. Proceedings in the criminal case did not need to be stayed as the subject-matter of both the incidents was different. No good ground being available to quash the F.I.R., Constitutional petition was dismissed. **1997 P Cr. L J 1730.**

325. Attempt to commit suicide : Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

COMMENTS

Law of suicide : According to Section 325 of the Penal Code, whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine or with both.

In Islamic law, suicide is a crime as is clear from Chapter 4V, Verse 30 of Holy Qur'an which says: "Don't destroy your lives."

Suicide is not the outcome of deranged intellect but crime is committed by a man in his sober senses. Abetment of suicide is also a crime.

As a general rule, a person is liable for abetment of an offence even though the offence abetted is not committed. Under the present section, on the other hand, there is no liability for abetment of suicide unless the person abetted does in fact commit suicide.

The commission of suicide must be by the hand of the person himself who commits suicide. If he is killed by another with his consent, the offence is culpable homicide not amounting to murder by reason of the application of Exception 5 to Section 300 and not suicide. The difference between the two offences may seem to be thin but it is nevertheless real for in the case of former offence (*viz.*, culpable homicide by consent) the accused takes an active part in the killing. So if A and B conspire to cause the death of B by poison and in pursuance A buys the poison and administers it to B, A is guilty of culpable homicide by consent but if B takes the poison himself, A is guilty of abetment of suicide under this section.

A threw himself into well, was saved by people, held guilty of attempt. **A I R 1919 All 376.**

Accused only running towards well, caught by people, *held*, no attempt. Only preparation to commit suicide, she might have changed her mind. **(1884) 8 Madras 5.**

Accused and deceased along with others took bhang during night. Deceased said that ordinary bhang did not give any intoxication. Accused challenged, brought out a white pill. Deceased started chewing in spite of warning, died. *Held*, accused guilty of abetment of suicide under Section 305, P.P.C. **P L D 1954 Lah. 103.**

Accused members of crowd, who had joined funeral procession from the house of deceased to cremation ground. Widow lead the procession to become *Suttee*. Encouraged her to commit suicide. They surrounded the police in order they may not interfere, burnt herself. *Held*, all were guilty of abetment of suicide. **1958 Cr. L J 967.**

Compromise : Offence under Section 325/34, P.P.C. being compoundable by the persons to whom hurt had been caused, case duly stood compounded by the injured prosecution witnesses and the accused and the compromise reached by them was consequently allowed. Conviction and sentence of accused were set aside and he was acquitted accordingly. **1997 PCr. LJ 1996.**

Appraisal of evidence : Delay of about 2/1-2 months in lodging the complaint stood duly explained. Prosecution witnesses, no doubt, were related to each other but they were the natural witnesses of the occurrence which had taken place in their house. One of the prosecution witnesses was herself the victim of violence perpetrated by the accused as a result of which she had sustained six injuries including the fractures of her right clavicle and a number of ribs. Ocular evidence was supported by medical evidence as well as by the testimony of an independent and disinterested witness whose presence at the place of occurrence was even admitted by the defence. Defence plea was found to be fake and false. Convictions of accused were upheld in circumstances. Sentences of accused, however, were reduced to the period already undergone by them as they had served the sentence of imprisonment for 7/8 months and had also been dismissed from service in consequence of their conviction in the case. **1997 S C M R 632 (b).**

326. Thug : Whoever shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with *qatl*, is a thug.

COMMENTS

Procedural irregularities--Effect : Accused were convicted by Trial Court under S. 326, P.P.C. which was substituted through Criminal Law (Fourth Amendment) Ordinance, 1991 and enforced prior to the occurrence. Trial Court, in circumstances, had convicted and sentenced accused under a penal provision of law which was no longer in existence. Trial Court should have recorded conviction of accused under corresponding provision, if any, enforced at the relevant time. According to charge-sheet accused persons were charged separately for

committing Qatl-i-Amd of two deceased. Allegations as levelled in F.I.R. by complainant and deposed by eye-witnesses were that all accused persons had caused injuries to both the deceased persons. Trial Court, in such a case, was obliged to determine the criminal liability of each accused *qua* each deceased as provided under S. 367, Cr.P.C. but it failed to do so. Such irregularities were not curable and failure on part of Trial Court to comply with mandatory provisions of S. 367, Cr.P.C. had vitiated order passed by Trial Court. High Court accepting appeals of accused set aside their convictions and sentences and remanded case to Trial Court for re-writing judgment in accordance with the provisions of S. 367, Cr.P.C. **1998 P Cr. L J 822.**

327. Punishment : Whoever is a thug, shall be punished with imprisonment for life and shall also be liable to fine.

COMMENTS

The provision of Section 311, P.P.C. would be attracted only when the accused is to be convicted by way of Tazir in spite of waiver or compounding of the right of Qisas. **1993 P Cr. L J 1220.**

The complainant no doubt had expressed his unwillingness to support the prosecution case, but still two eye-witnesses had not compounded the offence with the accused and therefore it was premature at such stage to frame the charge under Section 311, P.P.C. instead of Section 302, P.P.C. because an accused charged under a grave offence can always be convicted to a lesser offence, but if an accused is charged with a lesser offence initially then it would not be possible for the Court to punish him for a graver offence. **1993 P Cr. L J 1220.**

328. Exposure and abandonment of child under twelve years by parent or person having care of it : Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation : This section is not intended to prevent the trial of the offender for *qatl-i-amd* or *qatl-i-shibh-i-amd* or *qatl-bis-sabab*, as the case may be, if the child dies in consequence of the exposure.

COMMENTS

Object : This section is intended to prevent the abandonment or desertion by a parent of his or her children of tender years, in such a manner that the children, not being able to take care of themselves, may run the risk of dying or being injured. It does not apply when children are left under the care of others.

Scope : This section applies where a child is exposed and no death supervenes; if, however, death follows, the conviction must be under Section 302 or Section 304. The offence is complete notwithstanding that no actual danger or risk of danger arises to the child's life.

Ingredients : The section has three essentials :--

- (1) The person coming within its purview must be father or mother or must have care of the child.
- (2) Such child must be under the age of twelve years.
- (3) The child must have been exposed or left in any place with the intention of wholly abandoning it.

An offence under this section is not only cognizable but is also non-bailable. It is not necessary for the Courts to insist on formal complaint being lodged by the aggrieved person before taking cognizance of the offence. **P L D 1965 (Azad J&K) 38.**

329. Concealment of birth by secret disposal of dead body :

Whoever, by secretly burying or otherwise disposing of the dead body of a child whether such child dies before or after or during its birth, intentionally conceals or endeavours to conceal the birth shall be punishable with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

This section deals with the secret burial or disposal of the dead body of a child. If it is a foetus only then Sections 312 and 511 of the Code will apply. The facility with which the life of an infant at its birth is extinguished, and the temptation to take it away in cases of bastard children, justify such a provision.

Ingredients : The section requires three essentials:--

- (1) Secretly burying or otherwise disposing of the dead body of a child.
- (2) It is immaterial whether such child died before or after its birth.
- (3) Intention to conceal the birth of such child by such secret burying or disposal.

330. Disbursement of diyat : The *diyat* shall be disbursed among the heirs of the victim according to their respective shares in inheritance:

Provided that, where an heir foregoes his share, the *diyat* shall not be recovered to the extent of his share.

331. Payment of Diyat : (1) The *diyat* may be made payable in lumpsum or in instalments spread over a period of three years from the date of the final judgment.

(2) Where a convict fails to pay *diyat* or any part thereof within the period specified in sub-section (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until the *diyat* is paid full or may be released on bail if he furnishes security equivalent to the amount of *diyat* to the satisfaction of the Court.

(3) Where a convict dies before the payment of *diyat* or any part thereof, it shall be recovered from his estate.

COMMENTS

Payment of Diyat : Term of imprisonment to be served in jail by the accused in default of payment of Diyat amount. Neither the provisions of S. 331, P.P.C. provide any definite period of imprisonment for default in payment of Diyat, nor the Court has the powers to fix such period. Matter was, therefore, referred to the Law-making Authority to consider this aspect so as to remove the difficulty in interpreting S. 331, P.P.C. **1998 P Cr. L J 1781.**

332. Hurt : (1) Whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables or dismembers any organ of the body or part thereof of any person without causing his death, is said to cause hurt.

(2) The following are the kinds of hurt :

- (a) *Itlaf-i-udw* اِتْلَافِ عَضْو
- (b) *itlaf-i-salahiyyat-i-udw* اِتْلَافِ صِلَاحِيَّتِ عَضْو
- (c) *shajjah* شَجَّة
- (d) *jurm* جُرْم ; and
- (e) all kinds of other hurts.

COMMENTS

Sentence : The accused had to undergo agony of protracted trial and in appeal for more than 5½ years and had already remained in custody for 17 days. The sentence of imprisonment awarded to the accused was reduced to one already undergone by him in circumstances with some increase in fine. **1992 M L D 560.**

The accused having been charged under Sections 332 and 353, P.P.C. only could not be convicted under Section 333, P.P.C. as well. The conviction and sentence of accused under Section 333, P.P.C. being bad in law was set aside accordingly. **1992 M L D 560.**

Appreciation of evidence : The prosecution witnesses had no enmity with the accused so as to falsely implicate him in the case. The evidence of prosecution witnesses appeared to be straightforward, natural and reliable which had not been shaken in cross-examination. The complainant had no reason to leave the actual culprit and implicate the accused falsely. The defence of accused appeared to be an afterthought and defence witness to be a set up witness. The prosecution had, thus, proved its case against the accused beyond reasonable doubt. The conviction of the accused under Sections 332 and 353, P.P.C. was consequently maintained. **1992 M L D 560.**

333. Itlaf-i-udw : Whoever dismembers, amputates, severs any limb or organ of the body of another person is said to cause *Itlaf-i-udw*.

334. Punishment for Itlaf-i-udw : Whoever by doing any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person causes *Itlaf-i-udw* of any person, shall, in consultation with the authorised medical officer, be punished with *qisas*, and if the *qisas* is not executable keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to *arsh* and may also be punished with imprisonment of either description for a term which may extend to ten years as *ta'zir*.

335. Itlaf-i-salahiyyat-i-udw : Whoever destroys or permanently impairs the functioning, power or capacity of an organ of the body of another person, or causes permanent disfigurement is said to cause *itlaf-i-salahiyyat-i-udw*.

336. Punishment for itlaf-i-salahiyyat-i-udw : Whoever, by doing any act with the intention of causing hurt to any person, or with the knowledge that he is likely to cause hurt to any person, causes *itlaf-i-salahiyyat-i-udw* of any person, shall, in consultation with the authorised medical officer, be punished with *qisas* and if the *qisas* is not executable, keeping in view the principles of equality in accordance with the Injunctions of Islam, the offender shall be liable to *arsh* and may also be punished with imprisonment of either description for a term which may extend to ten years as *ta'zir*.

COMMENTS

Only one injury was described as grievous and all others were in the nature of bruises and lacerations including a swelling. The accused had already sufficiently suffered especially due to protracted trial and time spent in decision of his appeal and revision petition. Conviction of the accused was consequently maintained but sentence awarded to them was reduced to imprisonment already undergone by them in circumstances. **1993 M L D 1163.**

The Sessions Court had no jurisdiction to dismiss the complaint as the offences for which the accused were summoned were cognizable as well as non-compoundable. Complainant was prevented from attending the Court as he was in police custody in another case. Order of the Sessions Court dismissing the complaint due to absence of the complainant was set aside in circumstances. **1993 P Cr. L J 865.**

Accused was not alleged to have done any act with the intention of causing hurt to the complainant or any other person. Accused had allegedly attacked the complainant without any specification as to whether the attack was made with any weapon or empty-handed. Offence under Section 336, P.P.C. thus, was not made out against the accused. **1995 M L D 567.**

Quashing of F.I.R. : Accused was a qualified Dental Surgeon and also held the degree of Bachelor of Homeopathic Medicine and had been declared competent to practise in Homeopathic Medicine and Surgery. Act done by the accused, thus, was not intended to cause death and having been done by consent in good faith for the benefit of the sister of the respondent had made out no offence. Repeated visits of the sister of the respondent to the clinic of accused were sufficient to show the consent. F.I.R. registered against the accused was quashed in circumstances. **1998 M L D 2051.**

Leave to appeal : Complainant at the time of disposal of pre-arrest bail application of accused had made a statement before the Sessions Court that he had received a sum of Rs. 4,000 from the accused as compensation for settlement of the case, in consequence whereof interim pre-arrest bail already granted to accused was confirmed. Sessions Judge, however, on taking cognizance of the case refused to acquit the accused on the basis of said statement of the complainant and High Court in revision directed Sessions Court to acquit the accused in the case as and when hearing took place. Order of High Court was found to be just and proper in circumstances. Leave to appeal was refused accordingly. **1998 S C M R 466.**

Case of two versions--Accused summoned in private complaint--Validity : Two versions about the same occurrence being triable by the same Court, taking of cognizance by the Trial Court of the private complaint along with the murder case suffered from no illegality or irregularity. Sound reasons had been given by the Trial Court to support its conclusion about the existence of sufficient evidence to make out a *prima facie* case against the accused and his accomplices. Accused, thus, were rightly summoned in the complaint and the impugned order being lawful did not call for any interference. Revision petition was dismissed accordingly. **1998 PCr. LJ 938.**

337. Shajjah : (1) Whoever causes, on the head or face of any person, any hurt which does not amount to *Itlaf-i-udw* or *itlaf-i-salahiyyat-i-udw*, is said to cause *shajjah*.

(2) The following are the kinds of *shajjah*, namely:-

- (a) *Shajjah-i-Khafifah* شجہ خفیفہ
- (b) *Shajjah-i-mudihah* شجہ موضیحه
- (c) *Shajjah-i-hashimah* شجہ ہاشمہ
- (d) *Shajjah-i-munaqqilah* شجہ منعقلہ
- (e) *Shajjah-i-ammah* شجہ آمہ
- (f) *Shajjah-i-damighah* شجہ دامغہ

;and

(3) Whoever causes *shajjah*,--

- (i) without exposing bone of the victim, is said to cause *shajjah-i-khafifah*;
- (ii) by exposing any bone of the victim without causing fracture, is said to cause *shajjah-i-mudihah*;
- (iii) by fracturing the bone of the victim, without dislocating it, is said to cause *shajjah-i-hashimah*;
- (iv) by causing fracture of the bone of the victim and thereby the bone is dislocated, is said to cause *shajjah-i-munaqqilah*;
- (v) by causing fracture of the skull of the victim so that the wound touches the membrane of the brain, is said to cause *shajjah-i-ammah*;
- (vi) by causing fracture of the skull of the victim and the wound ruptures the membrane of the brain is said to cause *shajjah-i-damighah*.

337-A. Punishment of shajjah : Whoever, by doing any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, causes--

- (i) *Shajjah-i-knafifah* to any person, shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to two years as *ta'zir*;
- (ii) *shajjah-i-mudihah* to any person, shall, in consultation with the authorised medical officer, be punished with *qisas*, and if the *qisas* is not executable keeping in view the principles of equality in accordance with the Injunctions of Islam, the convict shall be liable to *arsh* which shall be five per cent of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to five years as *ta'zir*;
- (iii) *shajjah-i-hashimah* to any person, shall be liable to *arsh* which shall be ten per cent of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to ten years as *ta'zir*;
- (iv) *shajjah-i-munaqqilah* to any person, shall be liable to *arsh* which shall be fifteen per cent of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to ten years as *ta'zir*;
- (v) *shajjah-i-ammah* to any person, shall be liable to *arsh* which shall be one-third of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to ten years as *ta'zir*; and
- (vi) *shajjah-i-damighah* to any person shall be liable to *arsh* which shall be one-half of *diyat* and may also be punished with imprisonment of either description for a term which may extend to fourteen years as *ta'zir*.

COMMENTS

Appeal against acquittal : Leave to appeal was granted to the complainant to consider whether a police challan case can be finalized in favour of the accused simply on the ground that evidence had not been produced in its entirety without even noticing that the Trial Court was under the law required to secure the attendance of prosecution witnesses by resorting to coercive measures in the regard. **1998 S C M R 643.**

Injured prosecution witnesses had specifically named the accused to have caused specific injuries to them and they had stood the test of lengthy cross-examination. Convictions of accused were maintained in circumstances, but they having already suffered substantive imprisonment for almost one year and being on bail, term of imprisonment awarded to them was reduced to the period already undergone by them. **1998 PCr.LJ 1077.**

Quashing of proceeding : Complaint had been lodged by the mother of the accused with an aim to harass and torture the applicants who were eye-witnesses in Sessions trial of their deceased mother and to pressurise and prevent them from prosecuting their cause before the Sessions Court where the aforesaid criminal trial was pending. Principal object of Section 561-A, Cr.P.C. being to save the parties from mock, vindictive and abusive trials, proceedings pending in the Trial Court on the complaint of the accused's mother against the applicants were quashed. **1996 P Cr. L J 200.**

337-B. Jurh. (1) Whoever causes on any part of the body of a person, other than the head or face, a hurt which leaves a mark of the wound, whether temporary or permanent, is said to cause *jurh*.

(2) *Jurh* (جرح) is of two kinds, namely:-

(a) *Jaifah* (جائفه); and

(b) *Ghayr-jaifah* (غیرجائفه)

337-C. Jaifah : Whoever causes *jurh* in which the injury extends to the body cavity of the trunk, is said to cause *jaifah*.

COMMENTS

Jaifah—Body cavity : Body cavity does not denote only an area starting from upper part of the shoulder up to diaphragm and then from diaphragm to lower part of pelvis but it means a part of the body under which vital organs are located and if an injury penetrates into the body cavity and then enters that part of the body wherein vital organs are located, only then that can be treated as Jaifah and punishment can be awarded accordingly. **P L D 1998 Lah. 84.**

337-D. Punishment for jaifah : Whoever by doing any act with the intention of causing hurt to a person or with the knowledge that he is likely to cause hurt to such person, causes *jaifah* to such person, shall be liable to *arsh* which shall be one-third of the *diyat* and may also be punished with imprisonment of either description for a term which may extend to ten years as *ta'zir*.

COMMENTS

Punishment for Jaifah : Normal penalty provided by Section 337-D, P.P.C. no doubt is Arsh. but where the accused acts in a cruel or forceful manner the last portion of the section will certainly come into play which provides the punishment of imprisonment extending to ten years in addition to Arsh. **1996 P Cr. L J 555.**

Despite the fact that recovery of Chhuri from the accused was doubtful, he alone was proved to have inflicted the injuries to both the injured prosecution witnesses. Convictions and sentences awarded to accused by Trial Court were upheld in circumstances. 1995 P Cr. L J 1793.

337-E. Ghayr-jaifah : (1) Whoever causes *jurh* which does not amount to *jaifah*, is said to cause *ghayr-jaifah*.

(2) The following are the kinds of *ghayr-jaifah*, namely:-

- (a) *damiyah* دامية ;
- (b) *badi'ah* باضة ;
- (c) *mutalahimah* متلاحمة ;
- (d) *mudihah* موضعة ;
- (e) *hashimah* هاشمة ; and
- (f) *munaqqilah* منعقة

(3) Whoever causes *ghayr-jaifah*--

- (i) in which the skin is ruptured and bleeding occurs, is said to cause *damiyah*;
- (ii) by cutting or incising the flesh without exposing the bone, is said to cause *badi'ah*;
- (iii) by lacerating the flesh, is said to cause *mutalahimah*;
- (iv) by exposing the bone, is said to cause *mudihah*;
- (v) by causing fracture of a bone without dislocating it, is said to cause *hashimah*; and
- (vi) by fracturing and dislocating the bone, is said to cause *munaqqilah*.

337-F. Punishment of ghayr-jaifah : Whoever by doing any act with the intention of causing hurt to any person, or with the knowledge that he is likely to cause hurt to any person, causes--

- (i) *damiyah* to any person, shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to one year as *ta'zir*;
- (ii) *badi'ah* to any person, shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to three years as *ta'zir*;
- (iii) *mutalahimah* to any person, shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to three years as *ta'zir*;
- (iv) *mudihah* to any person, shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to five years as *ta'zir*;
- (v) *hashimah* to any person, shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to five years as *ta'zir*; and

- (vi) *munaqqilah* to any person, shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to seven years as *ta'zir*.

COMMENTS

Imposition of Daman is mandatory : Sentence of specified period of simple imprisonment cannot be provided in alternative by Trial Court. Convicts would be bound to pay Daman when their convictions have been maintained by Appellate Court. **N L R 1996 Cr. L J 1.**

Accused facing charge under Section 337-F(v) would be entitled to bail as the offence does not fall under prohibitory clause of Section 497(1) as punishment for offence under Section 337-F(v) does not exceed five years. Supreme Court in such case converting leave petition into appeal and allowing bail to accused who was refused bail by High Court. **N L R 1996 Criminal 541.**

Burden of proof : Burden of proof throughout trial remains on the prosecution and never shifts to the defence and prosecution has to prove its case against the accused beyond reasonable doubt. Fact of the accused's plea having been found false by the Court would not relieve the prosecution of its burden, nor any adverse inference can be drawn against the accused due to his failure to prove his plea. **1995 P Cr. L J 1262 (c).**

First information report : F.I.R. being not a substantive piece of evidence is not required to contain all minute details about the occurrence. **1995 P Cr. L J 1262.**

Quashing of Order : Trial Magistrate had dismissed the complaint in a slipshod manner without saying a word regarding the evidence of the eye-witnesses who had supported the contents of the complaint which fact was even admitted by him in his order. Incumbent upon the Trial Magistrate, in the circumstances, to advance the reasons for disbelieving the said eye-witnesses *qua* the *ipse dixit* of police and the medical opinion regarding the injuries found on the person of the injured witnesses. Sessions Court in setting aside the order of the Trial Court and sending back the complaint to it for passing fresh order after taking into consideration, the relevant facts and law had therefore not committed any irregularity or patent illegality so as to attract the provisions of S. 561-A Cr.P.C. Petition was accordingly dismissed *in limine*. **1998 P Cr. L J 936.**

337-G. Punishment for hurt by rash or negligent driving : Whoever causes hurt by rash or negligent driving shall be liable to *arsh* or *daman* specified for the kind of hurt caused and may also be punished with imprisonment of either description for a term which may extend to five years as *ta'zir*.

COMMENTS

Scope : This section applies only to acts done without any criminal intent, apart from rashness or negligence which is its essential ingredient. Personal injury intentionally caused is neither a rash nor a negligent act. **P L D 1958 Kar. 267.**

Simultaneous conviction : Where rash or negligent driving actually results in grievous hurt caused to another person, the offender would be liable either under Section 279, P.P.C. or under Section 338, P.P.C., but he cannot be legally convicted and sentenced both under Sections 279 and 338, P.P.C. simultaneously. **P L D 1993 Pesh. 146.**

Offence under Section 279, is included in offence under the section. The accused by his rash and negligent act causing simple hurt cannot be convicted for rash and negligent act as well as for causing simple hurt. **1984 P Cr. L J 746.**

The petitioner caused injuries by rash and negligent driving but at trial stage he contended that he was not in fact driving the jeep but has been made a scapegoat to save his officer who actually drove the vehicle. The contention was not supported by evidence nor findings of Courts below holding him reasonable for the offence, were found to be tainted by misreading. The petition in the circumstances was dismissed as without any force. 1982 S C M R 26.

Rash or negligent driving : Mere driving at high speed is not at all relatable to rashness or negligence. 1996 P Cr. L J 848.

Venue of accident and the manner in which the accident took place both were doubtful. Accused was not proved to have driven his bus rashly or negligently at the time of accident which appeared to have taken place due to defective driving of the complainant. Accused was acquitted in circumstances. 1996 P Cr. L J 848.

337-H. Punishment for hurt by rash or negligent act : (1) Whoever causes hurt by rash or negligent act, other than rash or negligent driving, shall be liable to *arsh* or *daman* specified for the kind of hurt caused and may also be punished with imprisonment of either description for a term which may extend to three years as *ta'zir*.

(2) Whoever does any act so rashly or negligently as to endanger human life or the personal safety of other, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

COMMENTS

Scope : This section deals with grievous hurt engendered by an act done so rashly or negligently as to endanger human life or the personal safety of others. Otherwise this section is similar in terms to the last section.

Injured prosecution witnesses were not guilty of contributory negligence in the accident. The accused was proved to have caused grievous injuries to the witnesses due to his rash and negligent driving and imposition of separate sentences both under Sections 279 and 338, P.P.C. therefore, not justified. Conviction and the sentence of the accused under Section 279, P.P.C. were consequently *set aside* and his conviction under Section 338/427, P.P.C. was maintained with reduction in his sentence thereunder. P L D 1993 Pesh. 148.

'Rashly or negligently' : Where an accident was due mainly, if not entirely, to the rashness of the accused in driving a motor-car while drunk and getting on to the wrong side of the road, while there were vehicles in front otherwise to his negligence is not seeing a tonga in front of him and not properly controlling the motor-car so as to avoid collision, the accused was held guilty of both rashness and negligence by which the accident was caused. P L D 1956 Lah. 745.

337-I. Punishment for causing hurt by mistake (khata) : Whoever causes hurt by mistake (*khata*) shall be liable to *arsh* or *daman* specified for the kind of hurt caused.

337-J. Causing hurt by means of a poison : Whoever administers to, or causes to be taken by, any person, any poison or any stupefying, intoxicating or unwholesome drug, or such other thing with intent to cause

hurt to such person, or with intent to commit or to facilitate the commission of an offence, or knowing it to be likely that he will thereby cause hurt may, in addition to the punishment of *arsh* or *daman* provided for the kind of hurt caused, be punished, having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years.

COMMENTS

Offences Against Property (Enforcement of Hudood) Ordinance (VI of 1979), S. 14 : Appreciation of evidence. Tranquillizer allegedly administered by accused in juice offered by him to victims was neither a poison nor stupefying or intoxicating or unwholesome drug. Neither life of victims was endangered nor they suffered a severe bodily pain for twenty days or more to have rendered them unable to follow their ordinary pursuits. Provisions of S. 337-J, P.P.C. being not applicable, accused were acquitted from conviction and sentence under S. 337-J, P.P.C. Prosecution had proved beyond reasonable doubt that accused had stolen Rs. 130 from pocket of complainant. Offence of accused fell within ambit of S. 379, P.P.C. and under S. 14 of Offences Against Property (Enforcement of Hudood) Ordinance, 1979. Accused was rightly convicted and sentenced accordingly. **1998 M L D 1875.**

337-K. Causing hurt to extort confession, or to compel restoration of property : Whoever causes hurt for the purpose of extorting from the sufferer or any person interested in the sufferer any confession or any information which may lead to the detection of any offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore, or to cause the restoration of, any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security shall, in addition to the punishment of *qisas*, *arsh* or *daman*, as the case may be, provided for the kind of hurt caused, be punished, having regard to the nature of the hurt caused, with imprisonment of either description for a term which may extend to ten years as *ta'zir*.

337-L. Punishment for other hurt : (1) Whoever causes hurt, not mentioned hereinbefore, which endangers life or which causes the sufferer to remain in severe bodily pain for twenty days or more or renders him unable to follow his ordinary pursuits for twenty days or more, shall be liable to *daman* and also be punished with imprisonment of either description for a term which may extend to seven years.

(2) Whoever causes hurt not covered by sub-section (1) shall be punished with imprisonment of either description for a term which may extend to two years, or with *daman*, or with both.

COMMENTS

Quashing of order of Sessions Court passed in revision : Magistrate had acquitted the accused without discussing in his order the prosecution evidence and the defence version and even without disclosing the grounds which convinced him to acquit the accused. Order passed by Magistrate being illegal and improper and being not a speaking order had rightly been set aside by the Sessions Court remanding the case to Trial Magistrate for fresh

decision. Order of Sessions Court to the extent of directing the Magistrate to record the evidence as a whole in the case, however, was set aside with the direction to Magistrate to record the evidence of the Medical Officer only and record the judgment thereafter strictly in accordance with law. Petition for quashing of order was disposed of accordingly. 1996 PCr.LJ 1442.

337-M. Hurt not liable to qisas : Hurt shall not be liable to *qisas* in the following cases, namely:--

(a) when the offender is a minor or insane:

Provided that he shall be liable to *arsh* and also to *ta'zir* to be determined by the Court having regard to the age of offender, circumstances of the case and the nature of hurt caused;

(b) when an offender at the instance of the victim causes hurt to him:

Provided that the offender may be liable to *ta'zir* provided for the kind of hurt caused by him;

(c) when the offender has caused *itlaf-i-udw* of a physically imperfect organ of the victim and the convict does not suffer from similar physical imperfection of such organ:

Provided that the offender shall be liable to *arsh* and may also be liable to *ta'zir* provided for the kind of hurt caused by him; and

(d) when the organ of the offender liable to *qisas* is missing:

Provided that the offender shall be liable to *arsh* and may also be liable to *ta'zir* provided for the kind of hurt caused by him.

Illustrations

- (i) A amputates the right ear of Z, the half of which was already missing. If A's right ear is perfect, he shall be liable to *arsh* and not *qisas*.
- (ii) If in the above illustration, Z's ear is physically perfect but without power of hearing, A shall be liable to *qisas* because the defect in Z's ear is not physical.
- (iii) If in illustration (i) Z's ear is pierced, A shall be liable to *qisas* because such minor defect is not physical imperfection.

337-N. Cases in which qisas for hurt shall not be enforced : (1) The *qisas* for a hurt shall not be enforced in the following cases, namely :--

(a) when the offender dies before execution of *qisas*;

(b) when the organ of the offender liable to *qisas* is lost before the execution of *qisas*:

Provided that offender shall be liable to *arsh*, and may also be liable to *ta'zir* provided for the kind of hurt caused by him;

(c) when the victim waives the *qisas* or compounds the offence with *badli-i-sulh*; or

(d) when the right of *qisas* devolves on the person who cannot claim *qisas* against the offender under this Chapter:

Provided that the offender shall be liable to *arsh*, if there is any *wali* other than the offender, and if there is no *wali* other than the offender he shall be liable to *ta'zir* provided for the kind of hurt caused by him.

(2) Notwithstanding anything contained in this Chapter, in all cases of hurt, the Court may, having regard to the kind of hurt caused by him, in addition to payment of *arsh*, award *ta'zir* to an offender who is a previous convict, habitual or hardened, desperate or dangerous criminal.

COMMENTS

Factors for awarding Tazir punishment : Factors to be seen for awarding Tazir punishment are the facts and circumstances of the case, nature of the injury/hurt caused, weapon used and the brutal or shocking manner in which the offence has been committed which is outrageous to the public conscience or adversely affects harmony among different sections of the people. **1998 S C M R 1528.**

337-O. Wali in case of hurt : In the case of hurt the *wali* shall be--

(a) the victim:

Provided that, if the victim is a minor or insane, his right of *qisas* shall be exercised by his father or paternal grand-father, howhighsoever;

(b) the heirs of the victim, if the later dies before the execution of *qisas*; and

(c) the Government, in the absence of the victim or the heirs of the victim.

337-P. Execution of qisas for hurt : (1) *Qisas* shall be executed in public by an authorised medical officer who shall before such execution examine the offender and take due care so as to ensure that the execution of *qisas* does not cause the death of the offender or exceed the hurt caused by him to the victim.

(2) The *wali* shall be present at the time of execution and if the *wali* or his representative is not present, after having been informed of the date, time and place by the Court an officer authorised by the Court in this behalf shall give permission for the execution of *qisas*.

(3) If the convict is a woman who is pregnant, the Court may, in consultation with an authorised medical officer, postpone the execution of *qisas* upto a period of two years after the birth of the child and during this period she may be released on bail on furnishing of security to the satisfaction of the Court or, if she is not so released, shall be dealt with as if sentenced to simple imprisonment.

337-Q. Arsh for single organs : The *arsh* for causing itlaf of an organ which is found singly in a human body shall be equivalent to the value of *diyat*.

Explanation : Nose and tongue are included in the organs which are found singly in a human body.

337-R. Arsh for organs in pairs : The *arsh* for causing *itlaf* of organs found in a human body in pairs shall be equivalent to the value of *diyat* and if *itlaf* is caused to one of such organs the amount of *arsh* shall be one-half of the *diyat*:

Provided that, where the victim has only one such organ or his other organ is missing or has already become incapacitated the *arsh* for causing *itlaf* of the existing or capable organ shall be equal to the value of *diyat*.

Explanation : Hands, feet, eyes, lips and breasts are included in the organs which are found in a human body in pairs.

337-S. Arsh for the organs in quadruplicate : (1) The *arsh* for causing *itlaf* of organs found in a human body in a set of four shall be equal to--

- (a) one-fourth of the *diyat*, if the *itlaf* is one of such organs;
- (b) one-half of the *diyat*, if the *itlaf* is of two of such organs;
- (c) three-fourth of the *diyat*, if the *itlaf* is of three such organs; and
- (d) full *diyat*, if the *itlaf* is of all the four organs.

Explanation : Eyelids are organs which are found in a human body in a set of four.

337-T. Arsh for fingers : (1) The *arsh* for causing *itlaf* of a finger of a hand or foot shall be one-tenth of the *diyat*.

(2) The *arsh* for causing *itlaf* of a joint of a finger shall be one-thirteenth of the *diyat*:

Provided that where the *itlaf* is of a joint of a thumb, the *arsh* shall be one-twentieth of the *diyat*.

337-U. Arsh for teeth : (1) The *arsh* for causing *itlaf* of a tooth, other than a milk tooth, shall be one-twentieth of the *diyat*.

Explanation : The impairment of the portion of a tooth outside the gum amounts to causing *itlaf* of a tooth.

(2) The *arsh* for causing *itlaf* of twenty or more teeth shall be equal to the value of *diyat*.

(3) Where the *itlaf* is of a milk tooth, the accused shall be liable to *daman* and may also be punished with imprisonment of either description for a term which may extend to one year:

Provided that, where *itlaf* of a milk tooth impedes the growth of a new tooth, the accused shall be liable to *arsh* specified in sub-section (1).

337-V. Arsh for hair : (1) Whoever uproots--

- (a) all the hair of the head, beard, mustaches, eyebrow, eyelashes or any other part of the body shall be liable to *arsh* equal to *diyat* and may also be punished with imprisonment of either description for a term which may extend to three years as *ta'zir*;
- (b) one eyebrow shall be liable to *arsh* equal to one-half of the *diyat*; and
- (c) one eyelash, shall be liable to *arsh* equal to one-fourth of the *diyat*.

(2) Where the hair of any part of the body of the victim are forcibly removed by any process not covered under sub-section (1), the accused shall be liable to *daman* and imprisonment of either description which may extend to one year.

337-W. Merger of arsh : (1) Where an accused more than one hurt, he shall be liable to *arsh* specified for each hurt separately:

Provided that, where--

- (a) hurt is caused to an organ, the accused shall be liable to *arsh* for causing hurt to such organ and not for *arsh* for causing hurt to any part of such organ; and
- (b) the wounds join together and form a single wound, the accused shall be liable to *arsh* for one wound.

Illustrations

- (i) A amputates Z's fingers of the right hand and then at the same time amputates that hand from the joint of his wrists. There is separate *arsh* for hand and for fingers. A shall, however, be liable to *arsh* specified for hand only.
- (ii) A twice stabs Z on his thigh. Both the wounds are so close to each other that they form into one wound. A shall be liable to *arsh* for one wound only.

(2) Where, after causing hurt to a person, the offender causes death of such person by committing *qatl* liable to *diyat*, *arsh* shall merge into such *diyat*:

Provided that the death is caused before the healing of the wound caused by such hurt.

337-X. Payment of arsh : (1) The *arsh* may be made payable in a lump sum or in instalments spread over a period of three years from the date of the final judgment.

(2) Where a convict fails to pay *arsh* or any part thereof within the period specified in sub-section (1), the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment until *arsh* is paid in full or may be released on bail if he furnishes security equal to the amount of *arsh* to the satisfaction of the Court.

(3) Where a convict dies before the payment of *arsh* or any part thereof, it shall be recovered from his estate.

337-Y. Value of daman : (1) The value of *daman* may be determined by the Court keeping in view:-

- (a) the expenses incurred on the treatment of victim;
- (b) loss or disability caused in the functioning or power of any organ; and
- (c) the compensation for the anguish suffered by the victim.

(2) In case of non-payment of *daman*, it shall be recovered from the convict and until *daman* is paid in full to the extent of his liability, the convict may be kept in jail and dealt with in the same manner as if sentenced to simple imprisonment or may be released on bail if he furnishes security equal to the amount of *daman* to the satisfaction of the Court.

337-Z. Disbursement of arsh or daman : The *arsh* or *daman* shall be payable to the victim or, if the victim dies, to his heirs according to their respective shares in inheritance.

338. Isqat-i-Hamal (اسقاط حمل) : Whoever causes a woman with child whose organs have not been formed, to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, or providing necessary treatment to her, is said to cause '*isqat-i-haml*'.

Explanation : A woman who causes herself to miscarry is within the meaning of this section.

338-A. Punishment for Isqat-i-haml : Whoever causes *isqat-i-haml* shall be liable to punishment as *ta'zir*--

- (a) with imprisonment of either description for a term which may extend to three years, if *isqat-i-haml* is caused with the consent of the woman; or
- (b) with imprisonment of either description for a term which may extend to ten years, if *isqat-i-haml* is caused without the consent of the woman:

Provided that, if as a result of *isqat-i-haml*, any hurt is caused to woman or she dies, the convict shall also be liable to the punishment provided for such hurt or death as the case may be.

COMMENTS

Scope : This section deals with the causing of miscarriage with the consent of the woman, while the next section deals with the causing of miscarriage without her consent.

Ingredients : This section requires two essentials :--

- (1) Voluntarily causing a woman with child to miscarry.
- (2) Such miscarriage should not have been caused in good faith for the purpose of saving the life of the woman.

338-B. Isqat-i-janin : (اسقاط جنین) : Whoever causes a woman with child some of whose limbs or organs have been formed to miscarry, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, is said to cause *Isqat-i-janin*.

Explanation : A woman who causes herself to miscarry is within the meaning of this section.

338-C. Punishment for Isqat-i-janin : Whoever causes *Isqat-i-janin* shall be liable to--

- (a) one-twentieth of the *diyat* if the child is born dead;
- (b) full *diyat* if the child is born alive but dies as a result of any act of the offender; and
- (c) imprisonment of either description for a term which may extend to seven years as *ta'zir*:

Provided that, if there are more than one child in the womb of the woman, the offender shall be liable to separate *diyat* or *ta'zir*, as the case may be, for every such child:

Provided further that if, as a result of *isqat-i-janin*, any hurt is caused to the woman or she dies, the offender shall also be liable to the punishment provided for such hurt or death, as the case may be.

338-D. Confirmation of sentence of death by way of qisas or tazir, etc. : A sentence of death awarded by way of *qisas* or *ta'zir*, or a sentence of *qisas* awarded for causing hurt, shall not be executed, unless it is confirmed by the High Court.

338-E. Waiver or compounding of offences : (1) Subject to the provisions of this Chapter and Section 345 of the Code of Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or compounded and the provisions of Sections 309 and 310 shall, *mutatis mutandis*, apply to the waiver or compounding of such offences:

Provided that, where an offence has been waived or compounded, the Court may, in its discretion having regard to the facts and circumstances of the case, acquit or award *ta'zir* to the offender according to the nature of the offence.

(2) All questions relating to waiver or compounding of an offence or awarding of punishment under Section 310, whether before or after the passing of any sentence, shall be determined by trial Court:

Provided that where the sentence of *qisas* or any other sentence is waived or compounded during the pendency of an appeal, such questions may be determined by the Appellate Court.

COMMENTS

Scope and application : The provision of Section 338-E, Penal Code, 1860 cannot be availed of by the convicts of the offences of culpable homicide amounting to murder, etc., the offences which stood substituted now. **P L D 1991 Lah. 347.**

The High Court desired the Legislature to consider the advisability of laying down precisely, the circumstances of the cases in which despite (غفر) waiver and receipt of compensation () Tazir punishment was to be inflicted and impression be dispelled that the provisions relating to the offences of qatl and hurt, as enjoined in Qur'an and Sunnah, were introduced not as a mere pretence and show but the Islamic Penal Laws had been enforced and put into real practice. **P L D 1991 S C 202.**

Compounding of Qisas (Sulah) in Qatl-i-Amd : Despite the fact that the offence was committed before the commencement of the Criminal Law (Second Amendment) Ordinance, 1990, offence committed in the case could be compounded as account of the provisions of Section 338-E read with Section 338-E, P.P.C.

338-F. Interpretation : In the interpretation and application of the provisions of this Chapter, and in respect of matter ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.

338-G. Rules : The Government may, in consultation with the Council of Islamic ideology, by notification in the official Gazette, make such rules as it may consider necessary for carrying out the purposes of this Chapter.

338-H. Saving : Nothing in this Chapter, except Sections 309, 310 and 338-E, shall apply to cases pending before any Court immediately before the commencement of the Criminal Law (Second Amendment) Ordinance, 1990 (VII of 1990), or to the offences committed before such commencement.

COMMENTS

Scope and meaning : The High Court desired that the Legislature should make the offences subject-matter of Section 299 to 338, P.P.C. as existing before the enforcement of the Criminal Law (Second Amendment) Ordinance, 1990, compoundable on account of forgiveness () or () as the case may be by adding a new section after 345, Cr.P.C. which should further provide :

- (a) that Sections 309, 310 and 323, P.P.C. (as amended by Ordinance, VII of 1990) shall *mutatis mutandis* apply; and
- (b) that the application for leave to compound the offence is to be submitted to the Court before which any appeal or revision against the conviction was pending and if no such proceedings were pending the application was to be submitted to the Trial Court which passed the order of conviction and sentence.

Cases of grant of pardon in the case of death sentence contemplated by the newly-added proviso to Section 381, Cr.P.C. could also be included for reference and decision to the Trial Court which had awarded the death sentence. **P L D 1990 S C 1172; P L D 1991 S C 202 ref.; P L D 1991 Lah. 347.**

Compounding of Qisas (Sulah) in Qatl-i-Amd : Despite the fact that the offence was committed before the commencement of the Criminal Law (Second Amendment) Ordinance, 1990, offence committed in the case could be compounded on account of the provisions of Sections 338-E read with Section 338-H, P.P.C. **P L D 1991 S C 202.**

OF WRONGFUL RESTRAINT & WRONGFUL CONFINEMENT

339. Wrongful restraint : Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception : The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration

A obstructs a path along which Z has a right to pass. A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

COMMENTS

Wrongful restraint : According to Section 339, whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence.

Wrongful restraint means the keeping of a man out of a place where he wishes to be and has a right to be. 'Restraint' implies abridgment of the liberty of a person against his will. Where he is deprived of his will-power by sleep or otherwise he cannot, while in that condition, be subjected to any restraint.

Ingredients : The section requires two essentials :--

1. Voluntary obstruction of a person.
2. The obstruction must be such as to prevent that person from proceeding in any direction in which he has a right to proceed.

Examples:

- (1) A obstructs a path along which Z has a right to pass. A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.
- (2) A builds a wall across a path along which Z has a right to pass. Z is thus prevented from passing. A commits the offence of wrongful restraints.
- (3) A places an obstruction on a road over which B had a right of passage for men and cattle, thereby preventing cattle from passing but leaving a portion of the way in such a condition as to be passable by human beings, A commits no offence.

340. Wrongful confinement : Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Illustrations

(a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

1. Words "Chapter XVI-A" added by Criminal Law (Amendment) Act, 11 of 1997.

(b) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

COMMENTS

In order to constitute wrongful confinement there must be a total restraint, not a partial one. If one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he cannot be said thereby to imprison him.

The retaining of a person in a particular place or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises that exterior will.

Ingredients : The section requires two essentials:

1. Wrongful restraint of a person.
2. Such restraint must prevent that person from proceeding beyond certain circumscribing limits.

Whoever wrongfully restrains any person : Wrongful confinement, which is a form of wrongful restraint, is the keeping a man within limits out of which he wishes to go, and has a right to go. **P L D 1963 Lah. 357.**

There must be a total restraint, not a partial one. If a person obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he cannot be said to have imprisoned him. Imprisonment is a total restraint on the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him.

The time during which a person is kept in wrongful confinement is immaterial. Detention through the exercise of moral force, without the use of physical force is sufficient to constitute this offence.

Duration of confinement : The time during which a person is kept in wrongful confinement is immaterial, except with reference to the extent of punishment. Wrongful confinement for a single hour is punishable under this section confinement for larger provisions is carried by following section.

Distinction : The difference between wrongful restraint and wrongful confinement is that in case of wrongful restraint, a person obstructed is obstructed to move to a particular direction and he can move or go towards any direction if he so pleases. In wrongful confinement, he cannot go or move to any direction whatsoever.

In case of wrongful restraint, there is a partial restraint on the liberty of a subject while in case of wrongful confinement, there is total restraint and it is a kind of total imprisonment.

The consent of the victim of the offence is relevant and is a good defence to a criminal charge.

341. Punishment for wrongful restraint : Whoever wrongfully restrains any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees or with both.

COMMENTS

Where a person erected a wall on a public street and thereby restrained others from proceeding in either direction he was convicted under this section with direction to remove the

wall within one month and in default to pay fine of Rs. 10 daily till it was removed. It was held by ten days come that no doubt an offence under this section had been made out, and the order directing removal of the wall could be made under Section 522, Cr.P.C. but the order directing payment of Rs. 10 for each day so long as the wall was not removed illegal. **P L D 1965 Pesh. 76.**

Punishment : "The offence of wrongful restraint, when it does not amount to wrongful confinement, and when it is not accompanied with violence, or with the causing of bodily hurt, is seldom a serious offence, and we propose, therefore, to visit it with a light punishment. **P L D 1959 Lah. 405.**

342. Punishment for wrongful confinement : Whoever wrongfully confines any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees or with both.

COMMENTS

There is no provision of law under which a person can be detained by the police on the pretext of keeping him "Shamil-i-tafteesh". This is to all intents and purposes wrongful confinement and the police officers resorting to it commit an offence as defined in Section 342. **P L D 1967 Kar. 649.**

But where a Railway constable found a person scaling a hedge and arrested him on suspicion of being concerned in a cognizable offence it was held that he did not commit the offence described in this section. **1969 S C M R 666.**

343. Wrongful confinement for three or more days : Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

344. Wrongful confinement for ten or more days : Whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENTS

For this offence physical observation is necessary, i.e., that the person wrongfully confined would have physically prevented if he had tried to get out. **P L D 1963 Lah. 357.**

Where the principal witness stated that she was not being illegally confined by her mother (accused). Continuance of criminal proceedings was held to be an abuse of the process of the Court. **1971 P Cr. L J 1322.**

345. Wrongful confinement of person for whose liberation, writ has been issued : Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any term of imprisonment to which he may be liable under any other section of this Chapter.

346. Wrongful confinement in secret : Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person of public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years in addition to any other punishment to which he may be liable for such wrongful confinement.

347. Wrongful confinement to extort property or constrain to illegal act : Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security or of constraining the person confined or any person interested in such person to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Offences Against Property (Enforcement of Hudood) Ordinance, 1979 : Accused were convicted and sentenced on charge that they blocked the road and snatched vehicle belonging to complainant in which he, along with prosecution witness, was sitting. Accused could not prove ownership of snatched vehicle by any evidence. Accused first of all in their statements under Section 342, Cr.P.C. denied occurrence as alleged by complainant in his complaint, but, later on, in statement under Section 340 (2), Cr.P.C. accused, taking a somersault, had admitted existence of occurrence though had twisted the story. Depositions of complainant and other witnesses, were inspiring confidence, though some discrepancies existed therein, but such discrepancies were neither material nor substantial to dislodge entire story of prosecution. Complainant had himself admitted that no other vehicle was robbed by accused. Circumstances in which vehicle was robbed by accused, had proved that accused were not habitual robbers or thieves. Court, in circumstances, maintained conviction of accused under Section 392, P.P.C. but reduced sentences awarded by Trial Court accordingly. 1998 M L D 518.

348. Wrongful confinement to extort confession or compel restoration of property : Whoever wrongfully confines any person for the purpose of extorting from the person confined or any person interested in the person confined any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined or any person interested in the person confined to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Of Criminal Force and Assault

349. Force : A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated

that such contact affects that other's sense of feeling: provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion in one of the three ways hereinafter described:

First : By his own bodily power.

Secondly : By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

Thirdly : By inducing any animal to move, to change its motion, or to cease to move.

350. Criminal force : Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Illustrations

(a) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other action on any person's part. A has, therefore, intentionally used force to Z; and if he has done so without Z's consent, in order to the committing of any offence or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(b) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has, therefore, used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.

(c) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily power. A has, therefore, used force to Z, and as A has acted thus intentionally without Z's consent in order to the commission of an offence A has used criminal force to Z.

(d) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has, therefore, intentionally used force to Z; and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, he has used criminal force to Z.

(e) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water, and dash up the water against Z's clothes, or something carried by Z. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with Z, or Z's clothes A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z, he has used criminal force to Z.

(f) A intentionally pulls up a woman's veil. Here A intentionally uses force to her, and if he does so without her consent intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(g) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that

water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling. A has, therefore, intentionally used force to Z; and if he has done this without Z's consent intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z. A has used criminal force.

(h) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z.

COMMENTS

Scope : The preceding section has defined 'force'. This section says that 'force' becomes criminal when it is used--

- (1) without consent, and
- (2) in order to the committing of an offence, or when it is intentionally used to cause injury, fear, or annoyance to another to whom the force is used.

The term 'force' as defined here applies to force used in connection with the human body.

Ingredients : The section requires the following essentials :--

- (1) The intentional use of force to any person.
- (2) Such force must have been used without that person's consent.
- (3) It must have been used--
 - (a) in order to the committing of any offence, or
 - (b) with the intention to cause, or knowing it to be likely that he will cause, injury, fear or annoyance to the person to whom it is used.

351. Assault : Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation it about to use of criminal force to that person, is said to commit an assault.

Explanation : Mere words do not amount to an assault. But the words which a person uses may give to his gesture or preparation such a meaning as may make those gestures or preparations amount to an assault.

Illustrations

(a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(b) A begins to unloose the muzzle of a forcing dog, intending, or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z, A has committed an assault upon Z.

(c) A takes up a stick, saying to Z, "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, accompanied by any other circumstances might not amount to an assault, the gesture explained by the words may amount to an assault.

COMMENTS

Scope : This section defines assault. It does not mean causing hurt actually. Mere gesture or preparation with the infection that it is likely to cause any person to apprehend that the person making gesture or preparation is about to use criminal force against him amounts to assault.

Ingredients : The ingredients of this section are:

- (1) Making of any gesture or preparation by a person in the presence of another.
- (2) Intention or knowledge of likelihood that such gesture or preparation will cause the person present to apprehend that the person making it is about to use criminal force to him.

352. Punishment for assault or criminal force otherwise than on grave provocation : Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

Explanation : Grave and sudden provocation will not mitigate the punishment for the offence under this section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence, or

· if the provocation is given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers such public servant, or

if the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

COMMENTS

This section provides punishment for assault or use of criminal force when there are not aggravating circumstances. The forcible taking of a person's thumb-impression amounts to an offence under this section.

353. Assault or criminal force to deter public servant from discharge of his duty : Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section is similar to Sections 332 and 333 the only difference between the three sections being in the act constituting the offence. A public servant is often exposed to considerable risk in the discharge of his duties.

Object : This section provides punishment for assaulting a public servant in the discharge of his duty. The public servant must be acting in the discharge of a duty imposed by law on him in the particular case, and the section will not protect him for an act done in good faith under colour of his office. An act which is the very contrary of the duties of a public servant cannot be said to be done by a public servant while acting or purporting to act in the discharge of his official duties. An assault on a public servant who is not discharging a duty imposed on him by law when he is assaulted falls under Section 352.

Bail. Petition for : That applicant was himself an injured person was not sufficient ground for grant of bail. He was arrested on the spot. No counter/ersion of the incident had come from the mouth of the injured applicant. He was even unable to explain his presence at the place of occurrence along with arms. Application for bail dismissed. **K L R 1995 Shariat Cases 112.**

Jurisdiction of Special Court : Accused persons were alleged to have taken the law in their hands when challenged by police party about the violation of ban regarding pillion riding. Allegations against accused persons being not covered by definition of "terrorist act" as provided under S. 6 of Anti-Terrorist Act, 1997, offence of accused person did not fall within Schedule to Anti-Terrorism Act, 1997. Member of police party who was injured having survived, offences against accused persons fell under S. 324/353/34, P.P.C. which offences were not mentioned in Schedule of Anti-Terrorism Act, 1997 so as to confer jurisdiction of Court constituted under Anti-Terrorism Act, 1997. Further allegation against accused persons was that they used rifle and pistol but even in F.I.R. it was not narrated whether the alleged weapons were automatic or semi-automatic. Offence against accused persons, thus, were not triable by Court under Suppression of Terrorist Activities (Special Courts) Act, 1975 and offences against accused persons under Ss. 353 & 186, P.P.C. were also not scheduled offences under that Act. Court constituted under Suppression of Terrorist Activities (Special Courts) Act, 1975, thus, also had no jurisdiction to hear case in view of S. 4 of Suppression of Terrorist Activities (Special Courts) Act, 1975. Court before whom challan of case against accused persons had to be submitted by S.H.O. was the Court of Area Magistrate and none else and bail application filed by accused persons, was to be first disposed of by Area Magistrate and not by Special Court. **P L D 1998 Lah. 318.**

Appeal against acquittal : Section 247, Cr.P.C. being in Chap. XX of the Code dealing with the trial of cases by Magistrates could not be imported in Chap. XXII-A, Cr.P.C. which dealt with trials before High Courts and Sessions Courts. Session Court after having dismissed the application of accused under S. 265-K, Cr.P.C. had no justification to let them off under S. 247, Cr.P.C. by dismissing the complaint which had been registered after due process of law. Offence under S. 389, P.P.C. being not bailable, complaint in view of the second proviso to S. 247, Cr.P.C. could not be dismissed on account of the absence of the complainant, even if the matter would have been pending on the file of a Magistrate. Since provisions of S. 247, Cr.P.C. could not be invoked in Sessions trial, Impugned order of Trial Court dismissing the complaint and acquitting the accused was set aside being illegal and the case was remanded for further proceedings according to law from the stage when the said order was passed. **1998 PCr.LJ 1909.**

354. Assault or criminal force to woman with intent to outrage her modesty : Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.

COMMENTS

Scope : This section punishes assault or criminal force to a woman with intention to outrage her modesty. It does not include rape. The offence under this section is of less gravity than rape.

"Outrage the modesty of a woman" : What may amount to an outrage to the modesty of a woman has not been defined. Therefore, the word 'outrage' is to be understood in its ordinary dictionary meaning. Outrage to the modesty of a woman will differ according to the country customs and race to which the woman belongs. It would be an outright outrage to the modesty of one woman which may not be considered as anything by another woman. To

place a hand on the shoulder of a Muslim or Hindu woman by a man may be considered by her as an outrage to her modesty, but it would not be minded by a European woman.

Where the prosecutrix aged about 14 years was lying on a cot inside her house under the warrandah. She had bolted the door of the house from inside and was all along. The appellant alongwith co-accused first scaled over the wall and then jumped into the courtyard. The appellant went near the cot of the complainant while co-accused kept standing on the wall. The appellant caught hold of the complainant from her hair and had a bite on her cheek. He then removed her Shalwar and also put off his Shalwar. She raised hue and cry which attracted other people who captured the appellant on the spot while his co-accused succeeded in running away. All the elements of substantive crime were proved because the attempt is the last but one stage and is the last ingredient or the offence which if successful would fructify into consummation. In the case of rape this stage must necessarily be the stage of penetration and nothing short of attempt at that ingredient. It was *held that* the removal of first her Shalwar and then his own Shalwar by the appellant clearly constituted acts of preparation. Before the appellant could assault the girl for a successful cohabitation with her, the witnesses were attracted by the alarm raised by the prosecutrix. The stage at attempt was never reached. The finding of lower Court of attempt at commission of Zina-bil-Jabar was incorrect the appellant was held guilty of the offence of outraging the modesty of the prosecutrix under Section 345, P.P.C. and was convicted. **1982 P S C 933**. Where the appellant was alleged that he slapped the complainant, tried to push her away and pulled her Burqa which was got torn from the front side. The pulling and tearing of Burqa of a Pardah-observing Muslim Lady was *held* as amounting to outraging the modesty of a woman within the contemplation of Section 354, P.P.C. **1982 P S C 698**. Where the accused was sentenced under Section 354, P.P.C. requiring the sentences to run consecutively, it was *held that* sentences being excessive, it would meet the ends of justice if the sentences run concurrently. **1980 P Cr. L J 381**.

The Trial and conviction for offence of criminal force to woman was held within the jurisdiction of Court of Session. The Federal Shariat Court was competent to hear and dispose of appeal notwithstanding fact that convict had filed appeal in the High Court and not in the Federal Shariat Court. **1984 S C M R 167**.

Sentence : Federal Shariat Court reduced sentence of convict to already undergone. Petition for enhancement of sentence refused on ground that convict had already suffered sentence of imprisonment for four months. Sentence held adequate. **1995 Law Notes 1012**.

Quashing of F.I.R. : Quashing of the case registered against the accused was sought on pure factual grounds. Adjudication of such a controversy was not permissible in extraordinary Constitutional jurisdiction without any evidence on record. High Court's function was not to oversee the correctness or otherwise of the police investigation and the accused were to face the process of law by appearing before the Trial Court and defending themselves. Substituted remedy of Art. 199 of the Constitution could not be extended to accused in the absence of any legal or jurisdictional objection. Constitutional petition was dismissed in circumstances. **1995 M L D 1455**.

Sentence, reduction in : Accused had already suffered almost three months of substantive imprisonment in addition to the agony of trial and punishment for the last more than three years. Accused was a young lad and was neither a previous convict nor a hardened criminal. Sentence of one year's R.I. awarded to accused was reduced to the period already undergone by him in circumstances. **1998 M L D 1706**.

Leave to appeal : Complainant (victim) was a mother of three daughters. Neither the complainant, nor her husband or even her father, on whose testimony conviction of accused was based, would have liked to fabricate a totally false story to implicate the accused as the same would have repercussion not only on their family honour but would also have left a bad scar on the future of daughters of the complainant. Use of criminal force and assault on the

victim was apparent and evidence on record had fully established the ingredients of the offence under S. 354, P.P.C. No case for interference was, thus, made out. Petition for leave to appeal was even barred by 57 days and no application seeking condonation of delay having been filed, the same was liable to be dismissed on the point of limitation. Leave to appeal by Supreme Court was consequently refused. **1998 S C M R 1146.**

1[354-A. Assault or use of criminal force to woman and stripping her of her clothes : Whoever assaults or uses criminal force to any woman and strips her of her clothes and, in that condition, exposes her to the public view, shall be punished with death or with imprisonment for life, and shall also be liable to fine.]

355. Assault or criminal force with intent to dishonour person, otherwise than on grave provocation : Whoever assaults or uses criminal force to any person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

356. Assault or criminal force in attempt to commit theft of property carried by a person : Whoever assaults or uses criminal force to any person in attempting to commit theft on any property which that person is then wearing or carrying shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

357. Assault or criminal force in attempting wrongfully to confine person : Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year or with fine which may extend to one thousand rupees, or with both.

358. Assault or criminal force on grave provocation : Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both.

Explanation : The last section is subject to the same explanation as Section 352.

Of Kidnapping, Abduction, Slavery and Forced Labour

359. Kidnapping: Kidnapping is of two kinds : Kidnapping from Pakistan and kidnapping from lawful guardianship.

COMMENTS

Kidnapping : The literal meaning of 'kidnapping' is child-stealing. The offence of kidnapping out of Pakistan may be committed in respect of minors as well as grown up persons but the kidnapping must be, without the consent of the person kidnapped. The offence of kidnapping out of lawful guardianship can only be committed with respect, to minors and persons of unsound mind, but the kidnapping must be without the consent of the guardian, consent of the minor being immaterial.

1. Sec. 354-A ins. by the Criminal Law (Admd.) Ordinance, XXIV of 1984.

360. Kidnapping from Pakistan, etc. : Whoever conveys any person beyond the limits of Pakistan without the consent of that person, or of some person legally authorised to consent on behalf of that person is said to kidnap that person from Pakistan.

COMMENTS

Object : The offence of kidnapping is sometimes committed by means of assault, and is sometimes attended with restraint; but this is not always the case. For instance a labourer who has been induced to embark on board a ship by false assurances that he shall be taken to a country where he shall have good wages, but whom the captain of the ship intends to sell for a slave, has not as yet been either assaulted or restrained although he is kidnapped.

Ingredients : This section requires two essentials :--

- (1) Conveying of any person beyond the limits of Pakistan.
- (2) Such conveying must be without the consent of that person or of some person, legally authorized to consent on behalf of that person.

361. Kidnapping from lawful guardianship : Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, said to kidnap such minor or person from lawful guardianship.

Explanation : The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception : This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

COMMENTS

Object : The object of this section is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons.

Scope : Kidnapping is an offence irrespective of any intent with which it is committed. It may be committed without assault or wrongful restraint or confinement. A child, for example, who is decoyed from its guardian, who soon forgets its home, and who consents to remain with the kidnapper, cannot be said to have been assaulted or restrained. This offence may be committed in respect of either a minor or a person of unsound mind. To kidnap a grown up person, therefore, is not this offence.

Ingredients : The section has four essentials :--

- (1) Taking or enticing away of minor or a person of unsound mind.
- (2) Such minor must be under 14 years of age, if a male, or under 16 years of age, if a female.
- (3) The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.
- (4) Such taking or enticing must be without the consent of such guardian.

'Takes or entices any minor' : The taking need not be by force, actual or constructive, and it is immaterial whether the girl consents or not. There must be a taking of the child out of the possession of the parent. The word 'take' means to cause to go, to escort or to get into possession. Enticing use of force or fraud is not necessary to constitute the offence. Mental attitude of minor is immaterial. Act of "taking" must be with intention to remove minor from, and without consent of guardian. **P L D 1963 Kar. 873.**

Word "keeping" in Section 361 is wider in import than "possession". Mere leaving of parent's house by minor, does not terminate lawful keeping of guardian. **P L D 1963 Kar. 873.**

Takes or entices --Meaning : Taking under this section does not mean mere physical taking of minor from guardianship but also includes constructive taking from constructive possession of guardian. **P L D 1963 Kar. 130.**

Constructive taking such as meeting at an appointed place outside would constitute constructive taking from the constructive possession of the guardian. **P L D 1963 Kar. 130.**

When taking complete : The act of taking is not, a continuous act : When once the boy or girl has been actually taken out on the keeping, the act is completed. If continuous, it would be difficult to say when the continuous taking ceased, it could only be when the boy or girl was actually restored to the keeping of the guardian. But this would constitute not the act of 'taking' but an act of determining.

The offence is completed as soon as the minor is actually taken out of the custody of his or her guardian. There can be no abetment of this offence in such a case on the hypothesis that the offence is a continuing one. But if there is a conspiracy before the kidnapping takes place, a conviction for abetment of kidnapping can be sustained.

Without the consent of such guardian : The taking or enticing of the minor out of the keeping of the lawful guardian must be without the guardian's consent. The consent of the minor is immaterial. If a man by false and fraudulent representations induce the parents of a girl to allow him to take her away, such taking will amount to kidnapping; consent given by the guardian after the commission of the offence would not cure it.

Determination of age : In determination of age by medical examination including X-Ray examination, margin of error is to be allowed. Medical certificate indicating that kidnapped girl was between 15 and 16 years of age and not excluding likelihood that she was 16 years of age at relevant time, fact of kidnapped girl's age being below 16 years was not established. The accused could not be convicted under para. (1) of Martial Law Regulation, 1977 (C.M.L.A.'s) No. 34 in circumstances of case. **P L D 1979 Kar. 804.**

Custody of girl : If a girl involved in a doubtful marriage is allowed to go with alleged husband and ultimate marriage is held to be invalid then serious complications are likely to arise. Complications can be avoided through safer course of entrusting custody to father subject to declaration that custody should not be handed over to somebody else. **P L J 1979 Lah. 621; P L D 1980 Lah. 7.**

Where the mother was alleged to have kidnapped his own son it was *held that* mother being natural guardian and covered by exception to this section is not liable for the kidnapping of her own son. Further it was *held that* she could not be liable for the offence of abetment or a party to such proceedings or transaction. **1983 P Cr. L J 629.** Where father kidnapped his son from the lawful guardianship of the mother, it was *held that* the accused in order to gain protection under exception to Section 361, P.P.C. must show that he acted with due care and caution. The father who took the boy from the lawful guardianship of the mother was held to be violative of the provisions of Section 361, because he could not prove due care and caution. **1981 P Cr. L J 550.**

Islamic Law : Under Islamic Law if the father takes away a son under seven years, or a daughter under puberty, if Sunni, or under seven years, if Shiah, or an illegitimate child from

the custody of the mother, he can be said to kidnap his own child, because the mother is by law the lawful guardian. According to the Sunni law, the mother is the guardian of her daughter till she reaches puberty which is presumed when the daughter completes her fifteenth year. Even a divorced wife is entitled to the custody of her children. After mother come the father and other relations standing within prohibited degrees.

Where the father believing in good faith to be entitled to lawful as good took away the child not for immoral or unlawful purposes and the possibility was that he did so to coerce his life to return to him it was held that the canvas covered by the exception to Section 361. **1971 P Cr. L J 982.**

362. Abduction : Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

COMMENTS

Scope : This section merely gives a definition of the word 'abduction', which occurs in some of the penal provisions which follow. Under the Code, kidnapping from lawful guardianship is a substantive offence, but 'abduction' is an auxiliary act, not punishable by itself, but made criminal only when it is done or other of the intents specified in the following Sections, **A I R 1934 Lah. 327**, viz., 364, 365 and 366. **(1950) 51 Cr. L J 408.**

Ingredients : The section requires two essentials :-

1. Forcible compulsion or inducement by deceitful means.
2. The object of such compulsion or inducement must be the going of a person from any place.

Continuing offence : The offence of abduction is a continuing offence, and a girl is being abducted not only when she is first taken from any public place but also when she is removed from one place to another.

Difference between abduction and kidnapping : Following is the difference between abduction and kidnapping :-

- (1) In 'kidnapping', the minor is simply taken away. The means used may be innocent. In 'abduction' force, compulsion, or deceitful means are used.
- (2) In kidnapping consent of the person taken or enticed is immaterial; in abduction, consent of the person removed, if freely and voluntarily given, condones abduction.
- (3) 'Kidnapping' is committed only in respect of a minor under fourteen years of age if a male, and under sixteen years if a female or a person of unsound mind; 'abduction', in respect of a person of any age.
- (4) In 'kidnapping', the person kidnapped is removed out of a lawful guardianship. A child without a guardian cannot be kidnapped. 'Abduction' has reference exclusively to the person abducted.
- (5) In kidnapping, the intent of the offender is a wholly irrelevant consideration; in abduction, it is the all-important factor.
- (6) Kidnapping from guardianship is a substantive offence under the Code, but abduction is an auxiliary act, not punishable by itself, but made criminal only when it is done with one or other of the specified intents.

Where the High Court was considering bail application under Section 498 of the Criminal Procedure Code and it refused to confirm the bail granted earlier, it was held by the Supreme Court that it was not possible for the High Court to declare at bail stage that the complaint made against the petitioner was completely false and without foundation and no

incident having taken place. The High Court was held to be right in saying that law should take its normal course and no justification existed for allowing pre-arrest bail to the petitioner. **1982 S C M R 384.**

363. Punishment for kidnapping : Whoever kidnaps any person from Pakistan or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Object : This section specifies the punishment for the offences defined in Sections 360 and 361. To support a conviction of kidnapping from lawful guardianship under this section, the facts must come within the ambit of Section 361, i.e., the person against whom the offence is committed must be under the age of sixteen, if a male, under the age of eighteen, if a female. This section must be read with Section 361, and the offence of kidnapping from lawful guardianship penalised by this section is the offence which is defined by Section 361.

Girl after abduction marrying accused, the contention that girl was *sui juris*, having contracted marriage she be allowed to go with her alleged husband. Whether custody be handed over to husband or father. It was *held that* to avoid all possible complications, safer course is to hand over custody to father in circumstances. Such custody, however, a subject to declaration of custody by a Court of competent jurisdiction. **P L D 1980 Lah. 7.**

In ascertaining the age of girl, ossification test is the proper method. Where there was an allegation of bias in the civil surgeon examining the girl, and his report did not indicate if the girl was examined by a Radiologist, the case was remanded to the Magistrate for applying his mind properly to the petition for re-examination of the girl. **P L D 1964 Dacca 228.** Where reasons in support of the medical testimony on the question of age were wanting, conviction based on such testimony was held not sustainable. **P L D 1963 Kar. 684.**

It is well established that medical evidence alone, even if it is based on ossification test, is not a sure guide for determining the age of a person, as different charts have been prepared for such test and further the process of ossification is dependent on a number of factors, such as climate, heredity, eating habits and even environment. **1975 P Cr. L J 453; P L J 1975 Cr.C (Kar.) 511.**

Sentence, Challenged to : Contradiction between the statements of witnesses. It appears that without hearing the arguments of the learned Counsel for the defence the judgment was announced. Undue haste by Trial Court had pre-determined the case of the appellant. *Held:* Appeal accepted. Sentence set aside. **K L R 1995 Criminal Case 283; 1996 M L D 635.**

Medical evidence alone even if based on ossification test, was not a sure guide for determining age of a person. **1984 P Cr. L J 2817.**

Father, was legal guardian of minor and deemed in law to be in constructive custody of minor. Taking away of child by father not being for immoral or unlawful purpose, no offence under Section 363, P.P.C., was made out against him. **1984 P Cr. L J 1988.**

Registration of case : Police had been persistently reporting right from initiation of the proceedings that no such occurrence regarding the alleged abduction of petitioner's son had taken place and that petitioner had no evidence to support his contention. Demand of the petitioner for registration of a case, as such, was *mala fide* and meant to harass his divorced wife and her relatives for having filed a suit for maintenance and obtained a decree against him. High Court was not obliged to order registration of a case in every case. Petitioner, if so advised, had an alternate remedy of filing a complaint. Constitutional petition was dismissed in circumstances. **1998 P Cr. L J 1521.**

Custody of minor—Hizanat: Examination of the various provisions of Muslim Law, the Criminal Procedure Code, particularly its Section 491 and Ss. 361 and 363 of the Penal Code, indicate that mother is entitled to "Hizanat" of her male child below the age of seven years, failing that the mother's relations under Muslim Personal Law are entitled to the custody of the minor. **P L D 1997 SC 852.**

Quashing of F.I.R. : Accused had allegedly kidnapped the six years old son of the complainant when he was returning from school. Accused was father of the minor and his natural guardian. Iqrarnama that the child was to remain with his mother (complainant) till the age of 7 years and that the mother was to lose the right of child's custody if she contracted second marriage was neither proved to be a forged or fabricated document, nor any proceedings had ever been initiated by the complainant mother for getting the same declared as void or invalid. Assertions that the complainant had contracted a second marriage and that the child was almost 8 years old could not be refuted. Mother in case of any grievance could move the Guardian Judge for the custody of the child. Continuation of proceedings on the basis of the F.I.R. could amount to unnecessary harassment as no Court could convict the accused on the charge levelled against him. Constitutional petition was consequently allowed and the F.I.R. was quashed accordingly. **1995 PCr. LJ 936.**

Constitutional petition : Registration of case. Police had been persistently reporting right from initiation of the proceedings that no such occurrence regarding the alleged abduction of petitioner's son had taken place and that petitioner had no evidence to support his contention. Demand of the petitioner for registration of a case, as such, was *mala fide* and meant to harass his divorced wife and her relatives for having filed a suit for maintenance and obtained a decree against him. High Court was not obliged to order registration of a case in every case. Petitioner, if so advised, had an alternate remedy of filing a complaint. Constitutional petition was dismissed in circumstances. **1998 PCr. LJ 1521.**

364. Kidnapping or abducting in order to murder : Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

Illustrations

(a) A kidnaps Z from Pakistan, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(b) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

COMMENTS

Scope : This section provides for the case of a kidnapper whose object is that the person kidnapped may be murdered or may be so disposed of as to be put in danger of being murdered. The section is not applicable where the object of the kidnapper is to hold the kidnapped person to ransom. In such a case the kidnapper can be convicted properly either under Section 363 or Section 365 of the Code.

The accused deceitfully took away the deceased from his home in the presence of two prosecution witnesses who had no previous enmity with the accused and were persons of independent opinion. A few days later the corpse of the deceased was found lying in a deserted place. By evidence it was proved that the letters purported to have been written by the deceased to his family members that these were actually written by the accused giving impressions that the deceased was still alive were forged. The witnesses appearing for prosecution were proved to be independent and having no enmity with the accused. The offence of abduction intending for murdering was proved beyond any shadow of doubt. In the

circumstances the conviction and sentence were maintained. **1981 P Cr. L J 1138.** The allegations against the accused were that he displayed highhandedness for abducting the prosecutrix and even repeated such obnoxious behaviour after her restoration to the parents. The plea on behalf of the accused was raised that the prosecutrix being 14½ years of age was capable of contracting her marriage with the accused, she having attained puberty and as such the accused committed no offence. The contention was repelled it being without any force and in view of the gravity of the offence committed by the accused. Bail already granted in the circumstances was cancelled. **1981 P Cr. L J 984.** Where the accused an aged person was convicted for offences under Sections 307 and 364, P.P.C. and was confined in jail as undertrial prisoner for about 2 years and 2 months before conviction. The period of detention of accused before conviction was allowed to be counted as sentence having been undergone by him. **1981 P Cr. L J 954.**

Framing charge under S. 364 : Kidnapping and abduction in order to murder are essential elements to frame charge under Section 364, P.P.C. **1996 P Cr. L J 478 (a).**

Compounding of offence : Legal heirs of the deceased namely her husband and two sons, all adult, had forgiven the accused in the name of God in order to improve their future relations and pass life in a cordial manner and had no objection to the acquittal of accused. Parties were allowed to compromise. Convictions and sentences recorded against the accused were, consequently, set aside and they were directed to be released forthwith. **1998 M L D 201.**

Petition for habeas corpus : Admittedly when the accused/respondent was brought in the Court he was under detention in charge under Section 364/302, P.P.C. *Held that :* It was therefore rightly argued by the learned counsel for the petitioner that in such an eventuality the habeas corpus petition became infructuous and the accused/respondent No. 1 be directed to approach the competent Court of law for his release on bail if he so wished. However, his release on bail in the heinous crime was not legally justified. Learned counsel for the State supported the application for cancellation of bail order. *Held that :* The bail already granted by the High Court to the accused/respondent cancelled. One of the arguments of the State Counsel was that the accused should have not been released on bail unless the prosecution had been given show-cause notice why he should not be released on bail under proviso to sub-section (1) of Section 497, Cr.P.C. **1997 PSC (Crl.) 1068.**

Appeal against acquittal : Relations between the parties were highly strained and inimical. Complainant's version on the face of it appeared to be absurd and improbable. According to medical evidence injuries suffered by the injured witness could be caused by a fall on hard and rough ground and could also be self-suffered and said statement of the Medical Expert had not been challenged which was fatal to the complainant's case. Acquittal of accused was based on proper appreciation of evidence which was neither contrary to facts nor perverse. Appeal against acquittal of accused was dismissed accordingly. **P L D 1995 Kar. 593 (a).**

364-A. Kidnapping or abducting a person under the ¹[age of fourteen] : Whoever kidnaps or abducts any person under the ¹[age of fourteen] in order that such person may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years and shall not be less than seven years.

¹ Subs. for 'age of ten' by the Criminal Law (Amdt.) Act, III of 1990.

COMMENTS

Scope : This section deals with another offence of kidnapping or abduction of aggravated nature and has provided severe punishment. It states that if any person either kidnaps or abducts any person whose age is less than ten years with the intention of committing murder or for subjecting to grievous hurt or slavery or to be used for satisfaction of the lust of any person or in order that the person kidnapped or abducted may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery or to the lust of any person, he shall be punished with death or with life imprisonment or with fourteen years rigorous imprisonment provided that if the accused is sentenced to less than life imprisonment the sentence shall not be less than seven years. Two minor girls aged 4 and 3 years were seduced by the accused and afterwards tried to run away with them but none of the elements with regard to intention mentioned in Section 364-A was made out by evidence on record. Conviction under Section 364-A was altered to one under Section 363, P.P.C. **P L D 1972 Lah. 374.**

Minor girl--Kidnapping of: Offence alleged against appellant entailed capital punishment. Evidence is scanting and contradictory and was not sufficient to warrant conviction. *Held :* Prosecution has failed to prove its case beyond reasonable doubt. Benefit of doubt extended. **P L J 1995 Cr.C. (Lah.) 156 (ii).**

Offence of Zina-bil-Jabr : Victim who was a baby-girl aged about nine years, had given direct straightforward and natural evidence against accused. Victim was questioned by Trial Court before recording her evidence and from replies given by her. Trial Court was satisfied that she was intelligent enough to depose in the Court. Victim in her evidence had supported prosecution in all material particulars directly implicating accused with act of kidnapping her from her house on the night of incident. No inherent defect or lacuna could be found in the evidence of victim and no strong reason was available to suspect the truth of her version. Testimony of victim was materially corroborated by strong circumstantial evidence to her father who was awakened from sleep when accused person after the offence, dropped her back to her house. Since accused was known to the victim and first informer, he was specifically named in F.I.R. Accused was not falsely implicated in the case. Delay in lodging F.I.R. if any, was neither fatal to prosecution case nor prejudicial to accused especially when such delay was satisfactorily explained by first informer. Evidence of victim was satisfactory and adequate enough to conclude that she was forcibly taken to hillock, compelled to strip off her Shalwar and subjected to Zaina-bil-Jabr. Such circumstance was further borne out by detection of human blood on clothes of victim, severe pain in her body and report to her father at odd hours of night after she was dropped by accused at her house. Victim or her father had no reason or motive to grind an axe against accused or to involve him wrongly after screening real offender. Special Court had also referred to admission of offence by accused and expression of remorse in cross-examination to victim while recording her statement under Section 164, Cr.P.C. before Judicial Magistrate. Guilt of accused having fully been proved on basis of satisfactory and reliable evidence, accused was rightly convicted and sentenced by Trial Court. **1998 P Cr. L J 1429.**

365. Kidnapping or abducting with intent secretly and wrongfully to confine person : Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Scope : This section lays down the same penalty as Section 363, but it punishes abduction not mentioned in that section. It requires an intention to confine a person secretly and wrongfully. Kidnapping and confining in broad daylight without any secrecy amounts to an

offence under Section 342. Essence of offence under this section is kidnapping. Therefore, where the accused cannot be convicted under Section 363 she cannot be convicted under this section.

Husband who takes away his wife by force and confines her against her will, would be liable to conviction under Section 365. **N L R 1995 SC 528 (b) = 1995 PCr. LJ 1885.**

Accused discharged by Magistrate--Validity : Magistrate had proceeded to discharge the accused in unchaste haste basing his conclusion on extraneous and irrelevant considerations without appreciating that the police had applied for the remand of accused in terms of S. 167, Cr.P.C. as it was not possible to conclude the investigation within 24 hours. Magistrate should have allowed the Police at least a week's time to complete the investigation which was reasonable time keeping in view the proviso to S. 173 (1), Cr.P.C. and it was not the stage to embark upon the merits and demerits either of the prosecution case or of the defence plea. Magistrate in doing so had not only foreclosed the remedy of the complainant by way of private complaint, but had also closed the scope for the police to move for further investigation and the complainant had been left without any remedy. Impugned order passed by Magistrate was patently illegal, without jurisdiction, perverse and amounted to killing the prosecution on extraneous and artificial considerations on the very day the F.I.R. was registered and the same was consequently set aside with the direction to police to proceed in accordance with law. **P L D 1998 Lah. 517**

¹[365-A. Kidnapping or abducting for extorting property, valuable security, etc. : Whoever kidnaps or abducts any person for the purpose of extorting from the person kidnapped or abducted, or from any person interested in the person kidnapped or abducted, any property, whether movable or immovable, or valuable security, or to compel any person to comply with any other demand, whether in cash or otherwise, for obtaining release of the person kidnapped or abducted, shall be punished with ²[death or] imprisonment for life and shall also be liable to forfeiture of property.]

COMMENTS

Abscondence : Abscondence, no doubt, can be treated as a supporting circumstance to other evidence which in itself is strong enough to sustain conviction for the crime charged, but such conduct by itself has never the effect of remedying the defects in the other evidence led by the prosecution to show accused's participation in the crime. **P L D 1995 Lah. 229 (e).**

Accused had neither participated in the abduction of the abductee, nor demanded any ransom from him. Accused, however, was found to have wrongfully concealed the abductee knowing that he had been abducted. Accused was consequently convicted under Section 365, P.P.C. and his sentence of imprisonment for life was reduced to 7 years' R.I. with fine accordingly. **P L D 1995 Kar. 534.**

Court while dealing with a case under criminal law was obliged to take into consideration all matters placed before it before arriving at the conclusion whether a fact stood proved or not. Proof of a fact would depend not only upon the accuracy of the statement but also upon the probability of such fact having existed. **P L D 1995 Kar. 315.**

Court has to put defence evidence in juxtaposition with the prosecution evidence and then to assess as to which of the two is worthy of reliance. **1995 P Cr. L J 1430.**

1. S. 365-A added by the Criminal Law (Amendment) Act, III of 1990.

2. Words added by the Criminal Law (Amendment) Act, II of 1991.

Neither any proper identification parade had been held in the case, nor any identification as alleged had been made by the witnesses. Identification made by the abductee in Court was also doubtful because of his short-sightedness and the accused having been previously shown to him by the police. Neither the abductee nor the ransom money had been recovered from the accused. Accused were acquitted in circumstances. **1995 P Cr. L J 1394.**

A perusal of Section 365-A shows that person who has abducted, would be liable to such charge. It does not provide for punishment for attempting commission of said offence. Section 511, P.P.C. deals with attempts but it has not been included in Schedule attached to Suppression of Terrorist Activities (Special Courts) Act. *Held*: Very trial held by Special Court stands vitiated as Special Court had no jurisdiction to try said case. **P L J 1995 Cr.C. 481(ii); 1996 M L D 202.**

Identification parade : Contentions were that after the rejection of the evidence regarding the identification parade reliance by Trial Court on the identification of accused before it had no value and that after exclusion from consideration identification of accused before Trial Court, no other evidence was available to link them with the crime. Leave to appeal was granted for reappraisal of entire evidence needed by the said contentions. **1998 S C M R 752.**

Acquittal of accused : Complainant had made massive improvements in his statement made in the Court as against the version given by him in the F.I.R. Prosecution evidence was contradictory. Arrest of accused as alleged by the prosecution and recovery of weapons in the case were doubtful. Complainant had not mentioned in the F.I.R. that the culprits would contact him on telephone or given him the date, time and place for collecting the ransom amount. Accused was acquitted in circumstances. **1997 PCr.LJ 1037.**

366. Kidnapping, abducting or inducing woman to compel her marriage, etc. : *[Rep. by the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979, S. 19.]*

1[366-A. Procurement of minor girl : Whoever by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine].

COMMENTS

Object : This section and Section 366-B were introduced to punish the export and import of girls for prostitution. Section 366 penalises the procurement of a woman where such procurement amounts to abduction. The aim of this section is to prevent immorality, and its provisions are framed more with the desire of safeguarding the public interest of morality than the chastity of one particular woman. Often it may happen that a girl under 18 may desire to leave her husband to better her prospects elsewhere. Such a desire would not save her helper from a conviction under this section.

Scope : There is a close resemblance in the texts of Section 362 and this section and some of the salient ingredients of the two offences are common. An offence under this section is a continuing offence. The offence is one of inducement with a particular object and when

1. Sec. 366-A ins. by the Penal Code (Amendment) Act, XX of 1923.

after the inducement the offender offers the girl to several persons a fresh offence is not committed at every fresh offer for sale.

Every Muslim of sound mind and attaining puberty could enter into a contract of marriage. Puberty is presumed, in absence of evidence on completion of age of 15 years. Girl certified by doctors to have attained the age of 17 years cannot be said to have not attained puberty. Even according to complainant's counsel girl's age at the time of her abduction, as per birth certificate, stood at 14 years and some months. Girl also is pregnant for 6/7 months. Appellant girl, had attained the age of puberty when she entered into marriage contract with her husband and could not be taken away and handed over to her father against her wishes. **P L D 1977 Lah. 432.**

²**[366-B. Importation of girl from foreign country :** Whoever imports into Pakistan from any country outside Pakistan any girl under the age of twenty-one years with intent that she may be, or knowing it to be likely that she will be, forced or seduced to illicit intercourse with another person, shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.]

367. Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc. : Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery ¹[...] or knowing it to be likely that such person will be so subjected or disposed of shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Offence of 'abduction' or 'kidnapping' under Section 367 is in no way a lesser offence which merges into aggravated offence under Section 307. It is incorrect to contend that Section 367 being a lesser offence merged into aggrieved offence under Section 307 and as such under Section 71 appellant could not be convicted under Section 367. It was held: (i) Conviction of appellant under Section 307 was legal and proper. (ii) Consecutive sentences aggregating fourteen years' rigorous imprisonment awarded under Sections 307 and 367 was highly excessive. The High Court ordered that the sentences under these two sections would run concurrently. **N L R 1980 Cr. (Lah.) C. 525.**

368. Wrongfully concealing or keeping in confinement, kidnapped or abducted person : Whoever, knowing that any person has been kidnapped or has been abducted wrongfully conceals or confines such person shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purposes as that with or for which he conceals or detains such person in confinement.

COMMENTS

Scope : This section refers to some other party who assists in concealing any person who has been kidnapped and not to the kidnappers. A kidnapper who has been convicted under Section 366 cannot, therefore, be convicted also under this section. For the purpose of

² Sec. 366-B subs. by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.

¹ The words "or to the unnatural lust of any person" omitted by the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979.

this section, it is not necessary to prove that the person confined was abducted by any particular person.

This is one of those sections in which subsequent abetment is punished as a substantive offence.

369. Kidnapping or abducting child under ten years with intent to steal from its person : Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any movable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Object : Enticing away of children with no intention of taking them from their parents, but for the purpose of stealing ornaments from their person is punishable under this section.

Scope : The offence described in Section 365 is included in that described in this section, the kidnapping and the intention of dishonestly taking property from the kidnapped child being included in this section. The consent of the child kidnapped is immaterial.

370. Buying or disposing of any person as a slave : Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

371. Habitual dealing in slaves : Whoever habitually imports, exports, removes, buys, sells, traffics or deals in slaves, shall be punished with imprisonment for life, or with imprisonment of either description for a term not exceeding ten years, shall also be liable to fine.

COMMENTS

Habeas corpus petition: Police could not recover and produce the detainees in Court. Women and children of the petitioner's family, *prima facie*, had been made victims of forced labour under the bonded labour system with his connivance. Brick-kiln owner could not engage labour after making advance payments under the bonded labour system which was not only in negation of the fundamental right guaranteed under Art. 11 of the Constitution but was an offence under Ss. 11 and 12 of the Bonded Labour System (Abolition) Act, 1992 as well as under Ss. 371 and 374, P.P.C. in appropriate cases. Police was consequently directed to register a case against the petitioner and the brick-kiln owner who had been dealing the detainees under the bonded labour system. Police was also directed to recover the detainees and set them at liberty. **P L D 1997 Lah. 428.**

372. Selling minor for purposes of prostitution, etc. : [Repealed by the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979, S. 19.]

373. Buying minor for purposes of prostitution, etc. : [Repealed by the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979, S. 19.]

374. Unlawful compulsory labour : (1) Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to ¹[five] years or with fine, or with both.

¹ Subs. for 'one' by the Criminal Law (W.P. Amendment) Ordinance, XXXIV of 1969.

(2) Whoever compels a prisoner of war or a protected person to serve in the armed forces of Pakistan shall be punished with imprisonment of either description for a term which may extend to one year.

Explanation : In this section the expression "prisoner of war" and "protected person" shall have the same meanings as have been assigned to them respectively by Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, and Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, ratified by Pakistan on the second June, 1951].

COMMENTS

Object : This section is intended to prevent abuses arising from forced labour which riots were sometimes compelled to render to landlords.

Ingredients : The section requires two essentials:

(1) Unlawful compulsion of any person.

(2) Such compulsion must be to labour against the will of that person.

'To labour against the will' : The word 'labour' will apply either to mental or to bodily labour, though probably the latter was principally contemplated by the framers of the Code.

Of Rape

375. Rape : [Repealed by the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979, S. 19].

376. Punishment of rape : [Repealed by the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979, S. 19].

Of Unnatural Offences

377. Unnatural offences : Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which ¹[shall not be less than two years nor more than ten years], and shall also be liable to fine.

Explanation : Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

COMMENTS

Scope : This section punishes the offence of sodomy, baggery or hostility. The offence consists in committed sexual intercourse against the order of nature by a man with a man, or in the same unnatural manner with a woman or by a man of a woman with a best in any manner.

Conviction under Section 377 would be unsustainable when there was no ocular corroborative evidence, father and brother of victim did not support prosecution version and M L R and contents of M L R were not put to cross-examination. **N L R 1995 Cr. L J 189.**

¹ Words subs. by the Criminal Law (Amendment) Ordinance, III of 1980.

Semen of accused not sent to Serologist for grouping. Evidentiary value of semen stained swabs. Semen found on vaginal or anal swabs loses evidentiary value if the semen of the accused is not obtained and got examined and matched with the semen found on the said swabs by the Serologist. **1997 PCr.LJ 1107 (b).**

Sodomy : In case of sodomy, following signs, according to Modi are discovered if the boy (passive agent) is not accustomed to sodomy: (1) Abrasions on the skins near the anus with pain in walking and on defalcation, as well as during examination. These injuries are extensive and well defined in cases where there is great disproportion in size between the anal orifice of the victim and the virile member of the accused. Hence lesions will be most marked in children, while they may be almost absent in adults, when there is no resistance to the anal coitus. These injuries, if slight, heal rapidly in two or three days. In most of the cases, superficial abrasions, varying from $1/6"$ to $1" \times 1/6"$ to $1/4"$, external to the sphincter ani, are seen. In some cases there may be bruising of the parts round about the anus, and the abrasions may extent into the anus beyond its sphincter. (2) Owing to the strong contraction of the sphincter ani, the penis rarely penetrates beyond an inch, and consequently the laceration produced on the mucous membrane within the anus with more or less effusion of blood is usually triangular in nature, having its base at the anus and the sides extending horizontally inwards into the rectum. Lacerations internal to the sphincter ani are found in several cases, but a typical triangular wound only in a few cases. These signs may not be perceptible in cases where the active agent has introduced his penis slowly and carefully without using force into the anus of the passive agent who is a consenting party. (3) Blood may be found around the anus, on the perinaeum or thighs, and also on the clothes. (4) Semen may be found in or at the anus, on the perinaeum or on the garments of the boy too young to have seminal emissions. (5) Signs of struggle, such as bruises, scratches, etc., on his person, if he is a grown-up boy, and if he is not a consenting party. (6) Prolapse of the anus. (7) Gonorrhoeal discharge, or the presence of a syphilitic chancre. (8) The presence of faecal matter round the anus is a corroborative sign. Doctor J.W. Johnstone, in Medical Gazette, 1868, 213 states: Penetration seldom reaches beyond an inch, and force expends itself on the semi-lunar folds which in the empty guts droop on either side. In every case of clear penetration contract rupture will be found cutting horizontally towards the left superior or right inferior angle. The shape of the wound is characteristic, and it cannot be produced by any hard substance. A true sodomy wound is triangular; the base external, with the sides of the triangle retreating into the fundament. **P L D 1974 Azad J&K 74.**

Penetration, however little, should be proved strictly to prove the offence of sodomy. **1995 M L D 588.**

Accused had committed sodomy with the victim with his consent. Comparison and grouping of semen was highly essential to connect the accused with the offence which was not done. Accused, at the time of occurrence, was a raw youth of 17 years and a student and was not a previous convict. Conviction of accused was upheld, but sentence of ten years' R.I. with a fine of Rs. 20,000 awarded to him by Trial Court was reduced to two years' R.I. with fine of Rs. 1,000 and benefit of Section 382-B, Cr.P.C. in circumstances. **1998 M L D 1924.**

An attempt to commit sodomy is committed when an attempt is made to thrust the male organ into the anus of the passive agent. Mere preparation for operation should not necessarily be construed as an "attempt". **1995 M L D 588.**

The statements of the prosecution witnesses were corroborated by the medical evidence and the Court had no doubt in mind as to appellant had committed sodomy. The conviction of the appellant under Section 377 was quite proper and maintained. **1982 P Cr. L J 303.**

Partial acquittal of accused of the charge under Section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was sought on the ground that no case thereunder was made out even if the allegation made by the victim in the F.I.R. was accepted at its face

value. Trial Court was yet to frame the appropriate charge against the accused and examination of the merits of the case on the question of application of Section 12 of the said Ordinance could tantamount to pre-empting the duties and functions of Trial Court which was neither permissible nor desirable. Any observation by Supreme Court on the merits of the case relating to the said charge was likely to prejudice the case of either party not only to the extent of that charge but also the credibility of the witnesses, more particularly the victim of the crime. Leave to appeal was refused accordingly. **1995 S C M R 1405.**

Conviction would be unquestionable when there is a single accused and there is no question of mistaken identity or substitution. Sentence of 10 years' R.I. awarded by Trial Court would be reduced to 3 years' R.I. on account of fact that convict was a youth. **N L R 1995 SD 263.**

Joint trial : Offences of abduction and sodomy committed with regard to two different victims on different dates being separate acts not falling within the same transaction, their joint trial by the Trial Court was an irregularity which was not curable under Section 537, Cr.P.C. and the proceedings from the stage of framing of charge in the joint trial stood vitiated being of no legal consequence. Convictions and sentences of accused were consequently set aside and the case was sent back to the Trial Court for holding separate trials of the accused in accordance with law. **1996 P Cr. L J 1011.**

Sentence, reduction in : Appeal was not pressed on merits and only reduction in sentence was prayed for. Accused who was a teenaged boy with no previous criminal background was a labourer and only bread earner of the family and was not enjoying good health. Prosecution did not oppose reduction in sentence. Sentence of seven years' R.I. awarded to accused by Trial Court was reduced to two years and six months' R.I. in circumstances with fine and benefit of Section 382-B, Cr.P.C. **1996 P Cr. L J 312.**

Penetration is essential ingredient of the offence described in Section 377, P.P.C. **1996 P Cr. L J 685(b).**

Medical jurisprudence: Semen inside the anus washes away in case the victim eases himself. **1997 P Cr. L J 1107 (c).**

Leave to appeal: Leave to appeal was granted to accused by Supreme Court to examine whether the prosecution had been able to establish the guilt of accused beyond reasonable doubt, and whether the evidence had been appraised properly keeping in view the principles enunciated by superior Courts for safe administration of justice in criminal cases. **1998 S C M R 1145.**

CHAPTER XVII

OF OFFENCES AGAINST PROPERTY

Of Theft

378. Theft : Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1 : A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2: A moving effected by the same act which effects the severance may be a theft.

Explanation 3 : A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4 : A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5 : The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Illustrations

(a) A cuts down a tree on Z's ground with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft.

(b) A puts a bait for dogs in his pockets, and thus induces Z's dog to follow it. Here if A's intention be dishonestly to take the dog out of Z's possession without Z's consent A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move A has committed theft of the treasure.

(d) A being Z's servant and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not, therefore, be taken out of Z's possession, and A has not committed theft though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the high-road, not in the possession of any person. A, by taking it commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection A hides the ring in a place

where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits the theft.

(i) A delivers his watch to Z, a jeweller to be regulated. Z carries it to his shop. A, not owing to the jeweller, any debt for which the jewellers might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if A, having pawned his watch to Z, takes it of Z's possession without Z's consent not having paid what he borrowed on the watch, he commits theft, though the watch is his own property inasmuch as he takes it dishonestly.

(l) A takes an article belonging to Z out of Z's possession without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has, therefore, committed theft.

(m) A, being on friendly terms with Z, goes to Z's library in Z's absence, and takes away a book without Z's express consent for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to her husband. Here it is probable that A may conceive that Z's wife is authorised to give away alms. If this was A's impression, A has not committed theft.

(o) A is the paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has no authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A, in good faith believing property belonging to Z to be A's own property, takes that property out of Z's possession. Here, as A does not take dishonestly, he does not commit theft.

COMMENTS

A person will be guilty of the offence of theft :

- (1) if he intends to cause a wrongful gain or wrongful loss by the unlawful means of property to which the person gaining is not legally entitled or to which the person losing is legally entitled, as the case may be;
- (2) the said intention to act dishonestly is in respect of movable property;
- (3) the said property is taken out of the possession of another person without his consent; and
- (4) he removes that property in order to such taking **A I R 1936 S C 1094.**

Theft, extortion and robbery--distinction : In all robbery there is either theft or extortion. Theft becomes robbery if the offender voluntarily causes or attempt to cause to any person death or hurt or wrongful restraint or fear of such acts. Extortion becomes robbery if the offender at the time of committing extortion is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, instant hurt or instant wrongful restraint.

Permanent deprivation not necessary : The intention must be to take Permanent deprivation of the owner is not an ingredient of the offence. **P L D 1959 Azad J&K 35.**

Where the respondent was in possession of the disputed house and claimed ownership on the basis of it being gifted to him. He neither removed nor tampered with the household effects lying therein. Even it was not shown by evidence that he ever refused to deliver such movable property to the owner on demand. Respondent, in the circumstances had no intention to deprive owner of the immovable property and hence no case of theft made out against him.

379. Punishment for theft : Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

Scope : In considering a charge under this section, there may arise two lines of cases which must be distinguished; one line being when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily and the other line of cases being when the owner is kept out of possession temporarily not with any such intention but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense. In the latter line of cases the detention does not amount to causing wrongful loss.

Ingredients : In order to constitute theft five factors are essential :--

- (1) Dishonest intention to take property.
 - (2) The property must be movable.
 - (3) It should be taken out of the possession of another person.
 - (4) It should be taken without the consent of that person.
 - (5) There must be some removal of the property in order to accomplish the taking of it.
- 1957 S C J 686.**

Intending to take dishonestly : The absence of the person's consent at the time of moving and the presence of dishonest intention at the time of so taking certain essential ingredients of the offence of theft. Mere taking without consent does not prove dishonestly. In such a case a charge of theft would not be sustainable. **P L D 1960 Dacca 64.**

Removal of cattle from person seizing them under Section 10 of the Cattle Trespass Act, 1871 amounts to theft even by the owner of the cattle if removal is with dishonest intention. **P L D 1960 Lah. 149.**

The accused was charged *inter alia* with the theft. Subsequently police added further charge under Section 395, P.P.C. The respondent was thereupon arrested. Material brought on record by the prosecution revealed that the respondent was *prima facie* guilty of offence punishable with imprisonment for life or ten years. In circumstances of the case, bail before arrest was refused. **1977 P Cr. L J 520.** Where the subject-matter of the offence under Section 379, P.P.C. and Sections 15 and 17 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, was a truck lying on open road without any guard. Even police did not level any charge that any show of force was at all used. Moreover, it also did not contain even a whit of facts in relation to the offence of "Haraabah" as defined in Section 15 of Hudood Ordinance. Since the subject-matter was lying open on the road unguarded and no show of force was applied, it was held to be a simple theft case attracting no Hudood Ordinance provisions, it was held that Tehsil Criminal Court should take its cognizance. **1981 P Cr. L J 1089.**

Offences Against Property (Enforcement of Hudood) Ordinance, VI of 1979 : Theft liable to *hadd* and *Tazir*, the offence liable to *hadd* alone is punishable under Ordinance, VI of 1979 while offence of theft liable to *tazir* is punishable as an offence of theft under P.P.C. Where tractor was stolen while parked by roadside unattended the facts of case, hardly

attracted provisions of Section 9 of Ordinance and conviction under Section 22 of Ordinance was altered to one under Section 379, P.P.C. **1982 P Cr. L J 17.**

Quashing of F.I.R. : Accused who had sown the crop in question in their capacity as owners and harvested the same as such, were fully entitled to lift it without any let or hindrance. Accused being not tenants, appointment of Superdar by the Assistant Commissioner was unlawful who could not be deemed to have been so appointed in the eye of law. F.I.R. got registered by the so-called Superdar was, therefore, a nullity having been registered without jurisdiction and the same was quashed accordingly. **1998 P Cr. L J 1512.**

Section 379, P.P.C. had been added being a non-bailable offence as Section 430, P.P.C. was bailable, although the accused allegedly liable under Section 430, P.P.C., could not under the law, be held liable under Section 379, P.P.C. Police by making a wrong entry of Section 379, P.P.C. in the F.I.R. had transgressed its authority in order to ensure the forthwith arrest of accused injuring his honour and reputation, the maintenance and safeguard of which was his paramount Constitutional right. Addition of Section 379, P.P.C. in the F.I.R. was consequently quashed. **P L D 1997 Lah. 689.**

Addition of Section 379, P.P.C. with Section 430, P.P.C. in the F.I.R. is violative of Art. 25 of the Constitution. In the presence of Section 430, P.P.C. about offence of diminution of canal water the addition or inclusion of Section 379, P.P.C. in the F.I.R. is violative of Art. 25 of the Constitution concerning fundamental rights of the citizens. **P L D 1997 Lah. 689(c).**

380. Theft in dwelling house, etc. : Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Object : The object of the section is to give greater security only to property deposited in a house so as to be under the protection of the house and not to property about the person of the party from whom it is stolen. Theft from a person in a dwelling house is, therefore, simple theft under Section 379.

Scope : There is nothing in the section which prevents a person from being convicted under this section for a theft committed by him in his own house. It might at first seem that it was the intention of the Legislature to protect property by this section, not from the owner of the house but from others. The essential point in the offence of theft in a building is that the property should be under the protection of the building, and that the offence may be committed by the owner of the building or other person who has lawful access to the building.

The question whether the possessor should be presumed to be a thief or a receiver depends on the fact of each particular case. If a person is found in possession of stolen goods within a couple of weeks of the theft, the presumption should be raised that he is a thief, but if the goods are found in his possession, say, after about a month it would be safe to presume that he is a receiver of the stolen property. **P L D 1973 Azad J & K 7.**

Petition for special leave to appeal: Delay of more than one month in lodging the F.I.R. was not explained and the same coupled with the admitted background of enmity showed the proceedings to have been taken for ulterior motive and not for the advancement of justice. Police had also found the F.I.R. to be false and frivolous recommending action against the complainant under Section 182, P.P.C. Order of Magistrate acquitting the accused was based upon sound appreciation of factual as well as legal position and was not open to any legal exception. Petition was dismissed *in limine* accordingly. **P L D 1995 Lah. 293 (b).**

Circumstantial evidence: Conviction in the absence of direct evidence can be upheld only when all the hypothesis of the innocence of accused are ruled out and the case is free

from all doubts and no other explanation except the guilt of accused is possible. 1997 P Cr. L J 1472 (b).

381. Theft by clerk or servant or property in possession of master : Whoever being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

¹**[381-A. Theft of a car or other motor vehicles :** Whoever commits theft of a car or any other motor vehicle, including motor-cycle, scooter and tractor shall be punished with imprisonment of either description for a term which may extend to seven years and with fine not exceeding the value of the stolen car or motor vehicle.]

²**[Explanation :** Theft of an electric motor of a tube-well or transformer shall be within the meaning of this section.]

382. Theft after preparation made for causing death, hurt or restraint in order to the committing of the theft : Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term, which may extend to ten years, and shall also be liable to fine.

Illustrations

(a) A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(b) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

COMMENTS

Scope : The possession by a thief at the time of his 'committing a theft of a knife or other weapon, which, if used on a human being, might cause death or hurt would not of itself justify a conviction under the section. There must be something to show or from which it may properly be inferred, that the offender made preparation for causing one or more of the result mentioned in the section.

If hurt is actually caused when a theft is committed, the offence is punishable as robbery, and not under this section. In robbery there is always injury. In offence under this section the thief is full of preparation to cause hurt, but he may not cause it.

Where a camel was removed from its place of tethering but two male adult eye-witnesses were not produced by the prosecution to testify the occurrence, the accused was held to be not liable to "Hadd" but liable to "Tazeer" on account of recovery of the animal. Since the accused was found armed with hatchet and pistol, it was concluded that he made

1. S. 381-A added by the Criminal Law (Amdt.) Act, I of 1996.

2. Explanation added by Pakistan Penal Code (Amdt.) Act, XVI of 1996.

preparations for causing death, hurt or restraint in order to commit theft or to effect his escape. He was held to be liable for 'Tazeer' under Section 382, P.P.C. **P L D 1981 F S C 132.**

Theft by members of unlawful assembly after preparation for causing death : Where two sets of accused, one comprising ten persons coming prepared to remove produce from threshing floor of complainant party and other comprising four persons, including two appellants, later attracted to spot from their neighbouring fields. Second set of accused including two appellants forming a group distinct from rest, neither related to others nor involved in their dispute over hand or its produce and on utterance of derogatory and provocative remarks by complainant party giving *Katchi*, *barchi* and stick blows to members of complainant party resulting in death of two persons playing no part in removal of produce indulged in by first set of accused. It was held that the accused appellants were not members of unlawful assembly having common object of forcibly removing produce from spot. Therefore the convictions and sentence under Sections 148 and 382/149 were set aside. **1984 S C M R 823.**

Of Extortion

383. Extortion : Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits "extortion".

Illustrations

(a) A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(b) A threatens Z that he will keep Z's child in wrongful confinement unless Z will sign and deliver to A a promissory-note binding Z, to pay certain money to A. Z signs and delivers the note. A has committed extortion.

(c) A threatens to send club-men to plough up Z's field unless A will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B. and thereby induces Z to sign and deliver the bond. A has committed extortion.

(d) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

COMMENTS

Extortion : Extortion is distinguished from theft by the obvious circumstance, that the consent is obtained by putting the person in possession of property in fear of injury to him to any other. The offence is carried out by overpowering the will of the owner.

384. Punishment for extortion : Whoever, commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

This offence occupies a middle place between theft and robbery.

Theft and extortion : Extortion is distinguished from theft by the obvious circumstances that the consent is obtained by putting the person in possession of property in fear of injury to him or to any other. The offence is carried out by overpowering the will of the owner. In theft the offender's intention is always to take without that person's consent. Besides, the property which is obtained by extortion is not limited as in theft, to movable property only. As the word 'movable' is omitted in the definition, immovable property may be the subject of extortion.

Ingredients : The ingredients of extortion are:-

1. Intentionally putting a person in fear of injury to himself or another.
2. Dishonestly inducing the person so put in fear to deliver to any person any property or valuable security.

Extortion may be committed even though the threat may be to accuse a person of misconduct not amounting to an offence against the criminal law. Even the threat need not be a threat to accuse before a Judicial Tribunal; a threat to charge before any third person is enough.

The element of dishonesty is the essence of this offence. (1882) 2 Weir 440.

'To any person' : It is not necessary that the threat should be used, and the property received by one and the same individual. It may be a matter of arrangement between several persons that the threat should be used by some, and the property received by others; and they all will be guilty of extortion.

385. Putting person in fear of injury in order to commit extortion : Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

386. Extortion by putting a person in fear of death or grievous hurt : Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

387. Putting person in fear of death or of grievous hurt, in order to commit extortion : Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

388. Extortion by threat of accusation of an offence punishable with death or imprisonment for life, etc. : Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with imprisonment for life, with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if the offence be one punishable under Sec. 377 of this Code, may be punished with imprisonment for life.

389. Putting person in fear of accusation of offence, in order to commit extortion : Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit, commit an offence punishable with death or with imprisonment for life, or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable

to fine ; and, if the offence be one punishable under Sec. 377 of this Code, may be punished with imprisonment for life.

Of Robbery and Dacoity

390. Robbery : In all robbery there is either theft or extortion.

When theft is robbery : Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offence, for that end, voluntarily causes or attempts to cause to any person death or hurt, or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint.

When extortion is robbery : Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person, and by so putting in fear; induces the person so put in fear then and there to deliver up the thing extorted.

Explanation : The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations

(a) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and in order to the committing of that theft, has voluntarily caused wrongful restraint to Z, A has therefore committed robbery.

(b) A meets Z on the high road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(c) A meets Z and Z's child on the high-road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has, therefore, committed robbery on Z.

(d) A obtains property from Z by saying : "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees". This is extortion, punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

COMMENTS

If there is no theft or extortion there is no robbery.

Robbery is a special and aggravated form of either theft or extortion and means felonious taking from the person of another or in his presence against his will, by violence or putting him in fear. **A I R 1928 Cal. 498.**

The section contemplates that the accused should have, from the very start, the intention to deprive the complainant of the property, and should for that purpose either hurt him or place him under wrongful restraint. **P L D 1959 Kar. 648.**

'For that end' : The words "for that end" are crucial words which distinguish a case of theft accompanied with assault from that of robbery.

The use of violence will not convert the offence of theft into robbery unless the violence be committed for one of the ends specified in this section. Where the accused abandoned the

property obtained by theft and threw stones at his pursuer to deter him from continuing the pursuit, it was *held that* the accused was guilty of theft and not of robbery. **A I R 1918 Mad. 821.**

391. Dacoity : When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding is said to commit "dacoity".

COMMENTS

Offences of preparation and assemblage for committing dacoity punishable under Ss. 399 and 402, P.P.C **1995 M L D 1779 (g).**

Scope : Robbery becomes dacoity when it is committed by five or more persons conjointly. Word "conjointly" used in Section 391, P.P.C. means jointly. **1995 M L D 1779.**

Abettors who are present and aiding when the crime is committed are counted in the number. The number of persons concerned in the robbery must not be less than five.

The essentials of the offence of dacoity are that the theft should be perpetrated by means either of actual violence or of threatened violence. The threatened violence may be implied in the conduct and character of the mob. It is not necessary that the force or menace should be displayed by any overt act. It cannot avail the accused to say, or reduce the gravity of their offence, that no actual hurt was caused as no one dared to resist the overwhelming show of force, which was sufficient to terrify, and did in fact terrify, those whose business it was to protect the property. In a case of dacoity the circumstance that the inmates of the house, seeing the large number of dacoits, do not offer any resistance and no force or violence is required or used does not reduce the dacoity to theft.

Under this section the number of persons committing robbery must be five or more. Where the evidence showed that there were six robbers but at the trial three were acquitted, it was *held that* a conviction under this section was not sustainable, and that the accused should be convicted under Section 392. **P L D 1967 Dacca 528.**

392. Punishment for robbery : Whoever commits robbery shall be punished with rigorous imprisonment for a term which ¹[shall not be less than three years nor more than] ten years, and shall also be liable to fine ; and, if the robbery be committed on the highway ²[...] the imprisonment may be extended to fourteen years.

COMMENTS

Scope : This section specifies the punishment which can be inflicted in case of simple robbery. The next section punishes attempt to commit robbery. If hurt is caused in committing robbery, Section 394 applies; if there is an attempt to cause death or grievous hurt, Section 397 applies; and if the offender is armed with a deadly weapon, Section 398 applies.

Robbery : Definition of robbery contemplates that an accused should from very beginning have the intention to deprive another person of the property and to achieve that end, either hurt is caused or a person is placed under wrongful restraint, or it must be actually found that victim was put in fear of instant death, hurt or wrongful confinement. In absence of the positive evidence and the findings of the nature to establish the robbery as defined under

1 Subs. by the Criminal Laws (Amendment) Ordinance, III of 1980.

2 Words omitted by the Criminal Law (Amendment) Act, VII of 1993.

Section 390, P.P.C. The mere removal of articles by the accused armed with deadly weapons from the victim would not make out a case of robbery. **P L D 1994 Lah. 141.**

Trial Court had convicted the accused simply on the basis of statements made by prosecution witnesses under Section 161, Cr.P.C. which was not legal evidence against them. Accused were acquitted in circumstances. **1995 M L D 1635.**

Where the accused lured a minor girl to a ditch on the pretext of cutting Jharu-reeds for her. Having cut a few reeds he suddenly snatched the girl's dupata, put it round her neck and started twisting it to the extent that her throat was choked and she died. Thereafter the accused robbed her of her silver bangles. During investigation the accused confessed to have committed the offence, besides making extra confession. The witnesses correctly picked him out at the identification parade. No previous enmity between complainant party and the accused was subsisted. Moreover no complaint whatsoever was made to the Magistrate who supervised the identification parade that witnesses were provided opportunity to see the accused before the conduct of identification parade. It was *held that* the prosecution story was fully supported by the evidence of disinterested eye-witnesses. In the circumstances the accused was held to have been rightly convicted for murder and robbery. **P L D 1963 Lah. 384.**

Where the accused are merely picked up in the identification parade and the role attributed to them is not stated by the witnesses, identification is of no evidentiary value and cannot be relied upon. **1995 M L D 1997.**

The first information report was lodged within an hour of occurrence at police station was four miles away from the spot. F.I.R. contained all material details of occurrence including names of the accused, weapons, their specific roles, names of witnesses robbed and detail of property taken away. The medical certificate of the injured prosecution witness showed that he was examined about thirty minutes after the occurrence. The identification of the accused by prosecution witness was established at spot and before registration of case and, therefore, non-holding of text of identification was neither necessary nor desirable and omission did not attract prosecution case adversely at all. **1883 PCr.L J 2060.**

Identification parade necessary if culprits not named in the F.I.R. Identification test becomes necessary where names of the culprits are not given in the F.I.R. Holding of such test is not only a check against false implication but is a good piece of evidence against genuine culprits. **1997 S C M R 971.**

Allegation of gang rape--Medical evidence Value : Allegation against accused was that they committed Zina-bil-Jabr with prosecutrix one after the other and while leaving house of prosecutrix, they took away her belongings including ornaments, cash and T.V. sets etc. F.I.R. in case though was lodged with delay of six hours, but such delay was not fatal to prosecution case as distance between place of occurrence and police station was 6 k.m. and it was a night time occurrence. Nature of offence in case which was gang rape and dacoity, was such that a considerable time was required by the victim to come out of the shock and to gather her senses was not expected of victim in such a case that she would immediately run to lodge a complaint with the police. Neighbours and villagers on hearing about occurrence of such type gather on the spot and much of the time is consumed in narrating the event to them. No delay was, thus, found in lodging F.I.R. which could justify prosecution that same was recorded after meditation and contained a concocted story. Presence of prosecution witness was clearly recorded in F.I.R. thus, in no way he could be termed as a chance witness alleged by accused. Recoveries were effected as and when accused persons disclosed about them. In absence of any enmity between parties, statement of prosecutrix supported by medical evidence and the positive report of Chemical Examiner was more than sufficient to establish allegation of rape against accused. Contention of accused in the context of medical evidence was that as the vaginal swabs of the victim were not sent to the Serologist for semen grouping, the Report of Chemical Examiner had no evidentiary value in that regard. Contention was repelled on the ground that in view of latest Forensic Science advances, seminal grouping was

not a reliable and fool proof test but, in fact, was rather exploratory in nature than a positive proof to establish the identity of an accused in a rape case. Evidentiary value of the seminal grouping was merely corroboration of substantial evidence and it alone could not be made basis of conviction of an accused. Non-performance of such a test, thus, was not at all damaging or fatal to the prosecution case. Nothing was on record to show that prosecutrix or her husband had any enmity or ill-will against accused or the prosecution witnesses had any reason to falsely involve the accused in case. Defence itself admitted the occurrence although in a different manner. Prosecution having proved its case beyond any reasonable doubt against all three accused persons, accused was rightly convicted by Trial Court. Conviction of accused was upheld, but in view of fact that accused were youthful offenders and nothing was on record that they had previous criminal history their sentence was reduced accordingly. **P L D 1998 Lah. 383.**

Time-barred appeal was dismissed without going into merits by Federal Shariat Court--Effect : Federal Shariat Court had rightly dismissed the appeal of accused as time-barred without going into the merits of the case. Since Federal Shariat Court had not given its view on merits, it was not possible for Supreme Court to examine the merits of the case. Appeal was dismissed accordingly. **1997 S C M R 534.**

Jurisdiction of Special Court : Contention that the Special Court to whom the case had been entrusted under the provisions of the Special Courts for Speedy Trials Ordinance, 1987, which was later repealed, had no jurisdiction to try and convict the accused under S. 392, P P C, was without merit which even otherwise stood concluded by the appellate judgment of High Court and the decision of the Supreme Court. Constitutional petition was dismissed accordingly. **1994 PCr. LJ 1501.**

Appeal against acquittal : Inferences drawn by Federal Shariat Court from prosecution evidence as regards extra-judicial confession made by accused, recoveries affected from them and last seen evidence, were based on correct appraisal of evidence which was neither illegal nor perverse. No misreading or non-reading of any material piece of evidence by Federal Shariat Court, could be pointed out. Leave to appeal was refused by Supreme Court in circumstances. **1998 S C M R 1371.**

Reasons given by the Federal Shariat Court for convicting accused under Section 392, P P C were supportable from the evidence and circumstances appearing in the case. Leave to appeal was refused accordingly. **1998 S C M R 1208.**

Quashing of proceedings : Accused had been placed in column No. 2 of the challan submitted in the Court. Factual aspect of the matter about the non-existence of the material against the accused for their conviction could also be analysed and adjudicated upon by the Court of Ilqa Magistrate. Accused were, therefore, directed to move an application under S. 249-A, Cr.P.C. before the Ilqa Magistrate who was also the Trial Court. Petition was disposed of accordingly. **1998 PCr.LJ 200.**

393. Attempt to commit robbery : Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall be liable to fine.

394. Voluntarily causing hurt in committing robbery : If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which shall not be less than four years nor more than ten years, and shall also be liable to fine.

COMMENTS

An offence of voluntarily causing hurt of either description in committing or attempting to commit robbery, is punishable under this section. Section 397 is merely a rider to this section with reference to cases in which the hurt committed is grievous. **P L D 1963 Pesh. 6.**

Mere fact of the confessional statements of the accused having been recorded after about a month of their arrest did not make them doubtful as the same were not only inculpatory but were also corroborated by independent and uninterested prosecution evidence of the witnesses who were present at the spot and were victims of robbery. None of the victims of robbery, however, had been caused any hurt or injury by the accused. Accused were consequently convicted under Section 392, P.P.C. and their sentences were reduced accordingly. **1995 P Cr. L J 449.**

395. Punishment for dacoity : Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which ¹[shall not be less than four years nor more than] ten years and shall also be liable to fine.

COMMENTS

Scope : This section prescribes punishment for simple dacoity; Section 396, for dacoity accompanied with murder; Section 397, for dacoity with attempt to cause death or grievous hurt; Section 398, for attempt to commit dacoity when the offender is armed with a deadly weapon; Section 399 for making preparation to commit a dacoity; Section 400; for belonging to a gang of dacoits; and Section 402, for assembling for the purpose of committing dacoity.

Police despite having advance information about the presence of culprits in a bungalow did not associate two independent and respectable residents of the area with the arrest and recovery proceedings and no circumstances warranting departure from the mandatory provisions of Section 103, Cr.P.C. could be pointed out. Arrest of accused in the circumstances was doubtful. No identification parade after the arrest of accused was held which was necessary in the circumstances of the case. Prosecution evidence was sketchy, incoherent and unreliable. Accused was acquitted. **1995 P Cr. L J 1337.**

Offence under Section 395, P.P.C. being triable by the Court of Session, Magistrate Section 30 had no jurisdiction to take cognizance of the same. Conviction and sentence awarded to accused by the trial Magistrate were consequently set aside and the case was remanded to Sessions Court for fresh trial. **1995 P Cr. L J 1814.**

Name of accused did not appear in the F.I.R. Subsequent statement of complainant involving the accused in the case was false improvement which made the basis for other eye-witnesses as well for his false implication. Such aspect of the case was not attended to by the Courts below. Accused was acquitted on benefit of doubt in circumstances. **1995 S C M R 1350.**

396. Dacoity with murder : If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, everyone of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which ²[shall not be less than four years nor more than] ten years, and shall also be liable to fine.

COMMENTS

Object : In providing this section the object of the Legislature seems to be that the penalty of death or imprisonment for life may be inflicted on a person convicted of taking part

1. Subs. by the Criminal Laws (Amdt.) Ordinance, III of 1980.

in a dacoity in the course of which a murder is committed, even though there is nothing to show that he himself committed the murder or that he abetted it.

Ingredients : The first essence of an offence under this section is that the dacoity is the joint act of the persons concerned; and the second essence of the offence is that the murder is committed in the course of the commission of the dacoity in question.

Where the accused confessed his guilt before an official of agriculture department who was a middle aged respectable person having no concern with either party clearly stated each accused having confessed guilt separately and gave details as to how accused planned dacoity, selected house and then executed the same. It was *held that* there was no reason to disbelieve evidence of such a witness. The Defence Counsel did not criticise the recovery of stolen clothes from appellants and no previous enmity between the prosecution witnesses and accused was alleged or even suggested during cross-examination. Conviction of appellant could safely be maintained, it was held, solely on extra-judicial confession and recovery from them of clothes belonging to complainant and his family members. **P L D 1982 S C 267.**

Identification of accused: Rule of prudence requires independent corroboration of the statements of eye-witnesses *qua* each accused as an abundant caution, because the evidence of identity based on personal impression has to be approached with considerable caution specially when the whole case hinges upon such evidence. Testimony of sense cannot be implicitly relied upon even when the veracity of the witnesses cannot be challenged. Chances of error in identification become greatly increased when the identification is based on glimpse in the confession and pandemonium of the moment at the night even though the night is moonlit or the place of occurrence is fitted with electric bulb. **1995 S C M R 276 (e).**

Appeal against acquittal : Dismissal of appeal without hearing of accused. Although no order can be made to the prejudice of the accused, particularly in appeal against acquittal unless they have had an opportunity of being heard either personally or by counsel, yet there is no legal bar for the dismissal of the appeal against acquittal in the absence of the accused or without hearing them. **1995 S C M R 276 (d).**

Offences Against Property (Enforcement of Hudood) Ordinance 1979 : Complainant in the case was at the same time the Investigating Officer, S.H.O. of the police station in which the F.I.R was lodged, first informer and a Naib-Tehsildar with powers of a Criminal Court for recording judicial confessions and granting remand of accused, which was totally unjust and against principles and practices of the Courts and all his actions were without jurisdiction and *coram non iudice* and such irregularities were not curable ... All the three ocular witnesses of the incident were in substantial conflict among themselves ... Confessions made by accused having been retracted needed full corroboration beyond any reasonable doubt which was not forthcoming.... Recovered empties and arms were never sent to Ballistic Expert for matching. None of the recoveries was direct except a Tape Recorder which was doubtful having not been witnessed by the persons of the locality despite their being available. No identification parade was held in the case. Accused were acquitted on benefit of doubt in circumstances. **1998 M L D 662.**

397. Robbery or dacoity, with attempt to cause death or grievous hurt : If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person the imprisonment with which such offender shall be punished shall not be less than seven years.

COMMENTS

Scope of S. 397, P.P.C. Section 397, P.P.C. does not create any substantive offence, but it accomplishes Ss. 392 & 395, P.P.C. Section 397, P.P.C. in its nature is a rider to S. 394. P.P.C. **1998 PCr.LJ 1486.**

Section 397, P.P.C. does not create an substantive offence, but it accomplishes Sections 392 & 395, P.P.C. Section 397, P.P.C. in its nature is a rider to Section 394, P.P.C. 1998 P Cr. L J 1486.

Object : This section is intended to cover the case of a person who displays a deadly weapon to frighten his victims or their neighbours, or who makes use of any deadly weapon for other similar purposes and its operation is not confined to cases where the weapon is used actually for causing injury or for attempting to cause an injury to another. P L D 1964 Kar. 269.

The word "use" in Section 397 of the Penal Code, 1860 must be given its ordinary meaning and not a restricted meaning. It was argued that in order to apply Section 397 the offender should cause actual injury with any deadly weapon to the victim and only in that case it will amount to "using the deadly weapon." It was held that this interpretation of the word was not correct. If a culprit armed with deadly weapon threatens the victim therewith and thus makes it easy for the other culprit to commit robbery or dacoity without let or hindrance, he would be taken to have used the deadly weapon within the meaning of Section 397. P L D 1971 Lah. 776.

Where the accused created fear in the minds of the witnesses being armed with deadly weapons so that they should not resist the commission of dacoity, it was held that it amounted to the use of deadly weapon within the meanings of Section 397, P.P.C. 1980 P Cr. L J 836. Hatchets and *lathis* which are ordinarily carried by persons in Sind Area were held to be not deadly weapons within the meanings of Section 397, P.P.C. 1980 P Cr. L J 838. Where the conviction under Section 397, P.P.C. was based on recoveries of doubtful nature and evidence of unreliable character but convicting corroboration of evidence had forthcome in the nature of identification parade, the High Court maintained the conviction but reduced sentence. N L R 1980 Cr. (Lah.) 438. Ocular testimony of station master and two other railway employees regarding the commission of dacoity by accused was corroborated by testimony of two other disinterested witnesses. Footprints of accused from *wardat* also led to the village of accused. Weapons and watch of the station master were also recovered from the possession of the accused. The accused appeared to be after the cash in the custody of the station master and wanted to snatch it by overawing the station master by causing him hurt and putting him in fear of death or grievous hurt. Intention of the accused was clearly spelt out to obtain Government money lying in the safe. In the circumstances, the offence of dacoity was held to have been made out. 1980 P Cr. L J 836.

'The offender uses any deadly weapon, or causes grievous hurt' : Word "uses" occurring in Section 397, does not necessarily mean use of deadly weapon so as to cause injury. Carrying of a deadly weapon during dacoity or robbery is sufficient to bring the case within mischief of Section 397, P.P.C. P L D 1974 Kar. 195.

398. Attempt to commit robbery or dacoity when armed with deadly weapon : If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

COMMENTS

Applicability of S. 398, P.P.C. : Provision contained in S. 398, P.P.C. did not create any substantive offence, but simply provided that if any member of a gang of dacoits was armed with a lethal weapon during an attempt of commission of dacoity such member was to suffer minimum imprisonment of seven years. No separate sentence was warranted under law by reason of said section which simply placed a restraint on the power of the Court not to award sentence of less than seven years on conviction in case of attempt to commit robbery or dacoity when an offender was armed with any deadly weapon. Section 398, P.P.C. was applicable only to the case of an attempt to commit robbery and had hardly application to a case in which robbery had actually been committed. Trial Court, thus, had committed an error

of law by holding that accused had committed offence of robbery within meaning of S. 392 read with S. 398, P.P.C. Accused for achieving object or committing theft or in carrying away property obtained by theft, having not caused or attempted to cause to any person death or hurt or wrongful restraint, offence committed by accused would fall under S. 382, P.P.C. and not under Ss. 392 & 398, P.P.C. **P L D 1998 Kar. 118.**

This section is applicable only to a case of an attempt to commit robbery and has no application to a case in which the robbery has actually been committed. It can regulate the punishment only in cases of an attempt to commit robbery as distinguished from a case in which the offender has already accomplished his purpose and robbery has actually been committed.

It is the terror which the possession of a deadly weapon naturally creates that has led the Legislature to provide for a severe sentence where the offender has such a weapon.

399. Making preparation to commit dacoity : Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Preparation : Preparation to commit an offence is not punishable under the general principles of criminal jurisprudence, and an offence is supposed to be constituted when the act proceeds beyond the stage of preparation and reaches that of attempt. But it is an offence under this section to "make preparation for committing dacoity". The prosecution must show that there were persons who had conceived the design of committing dacoity. Once the existence of such a conspiracy has been established then any step taken with the intention and for the purpose of forwarding that design may justify the Court in holding that there has been preparation within the meaning of this section. A mere assembling without further preparation is not a preparation within the meaning of this section. Mere assembling without proof of other preparation is punishable under Section 402. A person may not be guilty of dacoity, yet guilty of preparation, and not guilty of preparation yet guilty of assembling. **I L R 41 Cal. 350.**

Word "preparation" implies the concept of devising, planning or arranging the means or measures for committing an offence. **1995 M L D 1779.**

Cases of constructive assemblage of criminals explained with stress that in such cases constructive assemblage of offenders cannot and should not be excluded from Section 402, P.P.C. even if there is no evidence of their physical assemblage. **1995 M L D 1779.**

Whatever the purpose of assemblage of accused might be, the same has to be found by the Law Enforcing Agencies by collecting evidence. It would not be sufficient to say that the accused at the time of their arrest had stated so and so. **1995 M L D 1779.**

Like dacoity there are large number of other crimes which affect a society at large, such as snipers firing, carnage in houses, mosques, imambargahs or other places of worship, etc., which are generally more heinous than dacoity and fall within the definition of "Fitna" and "Fasad" (means tumult, oppression, mischief). Preparation of such crimes, besides their commission, also needs to be treated as an offence which needs legislation by the Parliament. **1995 M L D 1779.**

None of the prosecution witnesses had stated that either the accused had assembled duly armed with weapons with the intention to commit a dacoity or he had heard them to be conspiring or planning to commit such offence. Even in the F.I.R. no assertion was made that the accused had assembled at the given place for the purpose of or for preparation of committing dacoity. Entire proceedings initiated on the basis of said F.I.R., had no legal sanctity. Accused were acquitted in circumstances. **1995 P Cr. L J 2052.**

Preparation to commit dacoity : Section 399, P.P.C. envisages preparation to commit dacoity which is a step beyond intention and has to be established through some overt act from the attending circumstances. **1998 PCr.LJ 1120 (b).**

400. Punishment for belonging to gang of dacoits : Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

"Belonging to a gang" : Association for the habitual pursuit of dacoity is the gist of the offence under this section.

It is sufficient to establish that the person accused belongs to a gang whose business is the habitual commission of dacoity, or in other words, that he was associated with others for the habitual pursuit of that offence.

Transfer of case from Sessions Court to Special Court without notice to accused--

Validity : Sessions Court before transferring the case of accused from the Court of Additional Sessions Judge to the Special Court established under the Suppression of Terrorist Activities (Special Courts) Act, 1975 ought to have provided an opportunity of hearing to the accused. Said order having been passed without giving any notice to the accused or without hearing him being in violation of the principles of natural justice was illegal and the same was consequently *set aside* with the direction to Sessions Court to pass a fresh order in accordance with law. **1997 M L D 275.**

Quashing of F.I.R. : Mere presence of accused in the graveyard did not amount to an attempt to commit dacoity. Accused appear to have been already in Police custody when the case was registered against them. No probability or chance of conviction of accused having been found in the case, the F.I.R. registered against them was quashed and they were consequently acquitted. **P L D 1994 Lah. 383.**

401. Punishment for belonging to gang of thieves : Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being of *thugs* or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Scope : This section "no doubt has excellent objects and uses; but it ought not to be restored to when the person sought to be brought within its four corners might have been made responsible for distinct and individual offences: nor is it intended to affect them, unless an association for the habitual commission of theft or robbery is clearly made out."

402. Assembling for purpose of committing dacoity : Whoever, at any time after the passing of this Act shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Applicability : Mere assembly of five or more armed persons cannot lead to the inference that their intention was to commit dacoity unless some overt act or circumstances are proved to support such inference. **1997 M L D 1725.**

Physical assemblage and constructive assemblage of offenders : Cases of constructive assemblage of criminals explained with stress that in such cases constructive assemblage of offenders cannot and should not be excluded from Section 402, P.P.C. even if there is no evidence of their physical assemblage. 1995 M L D 1779.

¹[Of Hijacking

402-A. Hijacking : Whoever unlawfully, by the use or show of force or by threats of any kind, seizes, or exercised control of, an aircraft is said to commit hijacking.

402-B. Punishment for Hijacking : Whoever commits, or conspires or attempts to commit, or abets the commission of, hijacking shall be punished with death or imprisonment for life, and shall also be liable to forfeiture of property and fine.

402-C. Punishment for harbouring hijacking, etc. : Whoever knowingly harbours any person whom he knows or has reason to be a person who is about to commit or has committed or abetted an offence of hijacking, or knowingly permits any such persons to meet or assemble in any place or premises in his possession or under his control, shall be punished with death or imprisonment for life, and shall also be liable to fine.

Of Criminal Misappropriation of Property

403. Dishonest misappropriation of property : Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations

(a) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself, A is not guilty of theft; but if A, after discovering his mistakes, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) A and B, being joint owners of a horse. A takes the horse out of B's possession, intending to use it. Here as A has a right to use the horse he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1 : A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory-note belonging to Z, bearing a blank endorsement. A knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2 : A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it, is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

Illustrations

(a) A finds a rupee on the high-road, not knowing to whom the rupee belongs. A picks up the rupees. Here A has not committed the offence defined in this section.

(b) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person on whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use, A has committed an offence under this section.

COMMENTS

Scope : The essence of the offence is that the property of another person comes into the possession of the accused in some neutral manner and is converted to his own use. No entrustment is required for this offence to be committed as in case of an offence under Section 405 Criminal misappropriation takes place when possession has been innocently come by but whereby a subsequent change of possession by or from the knowledge of some new fact with which the party was previously acquainted the retaining becomes wrongful and fraudulent.

In order that an offence under Section 403 or 406 of the Penal Code, 1860 be made out the two things that are necessarily required to be proved are the entrustment of the property and dishonest misappropriation or conversion to one's own use or disposal of property. Where the complainant in his evidence merely wished to show that money had been entrusted to accused and on account of his non-accounting for them the Court should draw an inference that they had been misappropriated, no charge could be validly framed against the accused. In order to prove a criminal offence the specific evidence has to be brought on record proving the ingredients of the offence very strictly. **P L D 1960 Kar. 926.**

In order to prove offence under Section 403, Penal Code, the prosecution has to prove:-

- (1) that the property was the property of the complainant;
- (2) that the accused misappropriated that property or converted it to his own use, and
- (3) that he did so dishonestly. **P L D 1958 S C (Ind.) 247.**

Theft and criminal misappropriation : In theft the object of the offender always is to take property which is in the possession of a person out of that person's possession and the offence is complete as soon as the offender has moved the property in order to a dishonest taking of it. In criminal misappropriation, there is not necessarily an invasion of the possession of another person by an attempt to take from him that which he possesses. The offender is already in possession of the property; and is either lawfully in possession of it, because either he has found it or is a just owner of it or his possession, it not strictly lawful, is not punishable as an offence because he has acquired it under some mistaken notion of right in himself or of consent given by another. In case of theft, mere removal from the possession of a person with dishonest intention is enough, while in the case of criminal misappropriation there must further be misappropriation or conversion.

"Dishonestly misappropriates" : To "misappropriate" means to set apart for or assign to the wrong person or a wrong use, and this act must be done dishonestly. If a trustee repudiates the trust and asserts that he holds the property on behalf of a person other than the one who entrusted him with it, he has misappropriated the property just as much as he would have been said to misappropriate it if he had been putting forward his own claims to it.

"Converts to his own use" : There must be actual conversion of the thing appropriated to the use of some person other than the person entitled thereto. Where the accused found a thing, and merely retained it in his possession, it was *held that* he could not be convicted of criminal misappropriation. **I L R 10 W R Cr. 23-A.**

Claim of right : A servant, who retained in his hands money which he was authorized to collect and which he did collect from the debtor of his master, because money was due to him as wages, was held guilty of criminal misappropriation. **11 W R Cr. 51.**

Secreting letters : The accused, a servant in the Postal Department, while assisting in the sorting of letters, secreted two letters, with the intention of handing them over to the delivery peon and sharing with him certain money payable upon them. It was *held that* the accused was guilty of attempt to commit dishonest misappropriation of property and of theft. **14 Mad. 229.**

Quashing of proceedings : Complainant wife had yet to lead evidence against her accused husband and his parents in support of her version and she could not be deprived of such opportunity merely because suits for dower and custody of minor were pending between the parties. Quashing of proceedings was declined in circumstances. **1994 P Cr. L J 2409.**

404. Dishonest misappropriation of property possessed by deceased person at the time of his death : Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's death, and has not since been in the possession of any person's legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine; and if the offender at the time of such person's death was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

COMMENTS

Object : The object of this section is to afford protection to property which by reason of its being peculiarly placed needs protection where the person who could look after it is dead and the person entitled to it has not yet appeared. It is clear that in the case of immovable property no such risk is involved except where the immovable property is first demolished and converted into movable property and thereafter it is dishonestly misappropriated or converted. No doubt the word used in this section is general and taken by itself may mean both movable and immovable property but looking to the context, the word "property" means movable property. **1955 M L R Criminal 328.**

Scope : The section is intended only to punish servants and strangers who could possibly have no right to, or interest in, the effects of a dead man and who misappropriate such effects, but not to punish near relations who take possession of and deal with the deceased's effects under a claim of independent ownership or a claim to succeed as heir to the deceased. **A I R 1915 Mad. 506.**

Where the articles of deceased were stated to be misappropriated by a remote relative who contended his share as heir of the deceased, *held that* charging accused with misappropriation of article of deceased not a desirable procedure, in the circumstances of the case. **P L D 1977 Kar. 354.**

Of Criminal Breach of Trust

405. Criminal breach of trust : Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property, in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Illustrations

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper, Z, going on a journey entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, residing in Dacca, is agent for Z, residing at Lahore. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage, to hold shares in the Bank of Bengal disobeys Z's directions and buys shares in the Bank of Bengal for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a Revenue-Officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

406. Punishment for criminal breach of trust : Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to ¹[seven] years, or with fine, or with both.

COMMENTS

Scope : The terms of the section are very wide. It applies to one who is in any manner entrusted with property or dominion over property. The section does not require that the trust should be in furtherance of any lawful object. The section then provides, *inter alia*, that if such a person dishonestly misappropriates or converts of his own use the property entrusted to him he commits criminal breach of trust. This part of the definition is complete in itself. It has no reference to the provisions as to disposal in violation of a direction of law, or of a legal contract. There are separate ways in which criminal breach of trust may be committed. This section embraces the cases of all those offenders not specifically provided for in Sections 407, 408 and 409. Offences committed by trustees with regard to trust property fall within the purview of this section.

Ingredients : The section requires :--

1. Entrusting any person with property or with any dominion over property.
2. The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) honestly using or disposing of that property or wilfully suffering any other person so to do in violation--
 - (i) of any direction of law prescribing the mode in which such trust is to be discharged, or
 - (ii) of any legal contract made touching the discharge of such trust.

Cheating, theft, criminal misappropriation and criminal breach of trust--comparison : The offence of criminal breach of trust is akin to cheating, theft and criminal misappropriation but differs from them in important respects. In criminal breach of trust the property is lawfully acquired, or acquired with the consent of the owner, but dishonestly misappropriated by the person to whom it is entrusted. In cheating the property is wrongfully acquired in the first instance by means of a false representation. If theft of property is taken without consent of the owner and the dishonest intention to take property exists at the time of such taking. In criminal misappropriation the property is innocently acquired often casually or by chance but by a subsequent change of intention the retaining becomes wrong and fraudulent.

Offence of criminal breach of trust would not be made out when there is no material to substantiate allegation of dishonest misappropriation, conversion to one's own use or disposal of property in violation of any direction of law. **1997 Cr. L J 502; 1998 P Cr. L J 162.**

'Entrusted' : Entrustment is an essential element of the offence described in Section 405. "Entrusted" is not necessarily a term of art. It may have different implication in different contexts. In its most general significance all it imports is a handing over the possession for some purposes which may not imply the conforming of any property right at all.

1. Subs. for 'three' by Criminal Laws (Amdt.) Ordinance, XXXIII of 1981.

Entrustment of property and failure of the accused to account of the same is sufficient to *inter* that the accused committed the offence of criminal breach of trust. It is not necessary for the prosecution to prove misappropriation directly. **P L D 1963 Dacca 983**. Where under the decree of a Court trust properties were being managed and the trustee filed yearly statement of account with the Register of Trust, it was *held* :-

- (1) there was no entrustment of property made by complainant to trustee as he had no *locus standi* as he was neither owner nor legally in possession of trust property;
- (2) no case under Section 406, P.P.C. was at all made out against the trustee. **N L R 1981 Cr. L J 130**.

Where the petitioner was prosecuted for criminal liability under Section 406, P.P.C. by the complainant after the dismissal of the civil suit of the complainant for recovery of certain amount both by Civil Judge as well as District Judge. It was *held* that the case was of civil nature and there was no justification for continuance of criminal proceedings against the petitioner except an abuse of process of Court. Criminal proceedings in these circumstances were quashed. **1981 P Cr. L J 1261**.

Admission by accused of liability to pay amount alleged to be misappropriated not necessarily an admission of any element of offence : Where the accused impliedly admitted his liability to pay by asking for time in which to make good the deficit, which time was extended on several occasions at his request, but he failed eventually to make up the loss and the case was reported to police. It was *held* that the accused was not proved to have admitted any element of the offence of criminal breach of trust. Much more is required than a mere acceptance of civil liability to make good an apparent loss of money, for holding that that loss is the result of breach of trust by the person making the admission, in the sense of Section 409, P.P.C. **P L D 1952 Lah. 648**.

Breach of trust by several persons : Entrustment is an essential ingredient of the offences of criminal breach of trust and a man cannot be guilty of this offence unless he is entrusted with the amount. If Section 34 is to be applied to punish several persons for the offence of criminal breach of trust, it is necessary to establish that all of them were entrusted with the amount. In the absence of entrustment a person may be guilty of abetment but cannot be charged and punished as a principal offender by the application of Section 34, for this section cannot create entrustment where there is none. **P L D 1952 Dacca 354**.

Quashing of proceedings : Civil and criminal litigation going on between the parties had disclosed a breach of contract which could not give rise to criminal prosecution. Amount could be recovered through the suit pending adjudication before a competent Court of law. Promise broken by the accused was not a criminal offence. Continuation of criminal proceedings against the accused amounted to an abuse of the process of Court in circumstances and the same were quashed accordingly. **1995 P Cr. L J 1257**.

View taken by Trial Court while dismissing the petition moved by accused under Section 249-A, Cr.P.C. could not be shown to be unsustainable in the eye of law. Prosecution had collected enough evidence against the accused which had been cited in the report submitted to the Court under Section 173, Cr.P.C. Series of transactions starting in 1989 and ending in 1993 had been taken into account by the Arbitrator during arbitration who had also given the finding regarding outstanding amount and directed the parties to settle the matter. Applicability of Sections 222 & 234, Cr.P.C. could not be discussed at such stage without prejudice to the merits of the case, particularly when the charge was yet to be framed by Trial Court and it would be open for the accused to take an objection if the charge was not correctly framed or was violative of any provisions of law, by referring to the evidence already collected and placed on record. Petition for quashing of proceedings was dismissed *in limine* in circumstances. **1997 M L D 1475**.

407. Criminal breach of trust by carrier, etc. : Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

408. Criminal breach of trust by clerk or servant : Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Scope : The offence is committed even where the act of the accused is to cause wrongful loss to his master for a time only.

Essential ingredients : Essential ingredient of Section 408, P.P.C. is dishonest misappropriation. Prosecution has also to prove the entrustment of the property to the accused in the capacity of being a clerk or a servant or that he had dominion over the property. **P L D 1997 Kar. 311.**

Servant : A servant, who received money for a specific purpose, and did not use it for that purpose, and, on being called on to account for the money, falsely said that he used it for that purpose, was held to have committed this offence.

'Employed as a clerk or servant' : If a person acts as a clerk or servant although there is no contract binding on him to work, yet so long as he does the duties he will come under the category of a clerk or servant. **(1918) 40 All 565.**

Extra-judicial confession: Confession made by accused to a respectable person voluntarily when he is not in police custody can be made a basis for his conviction. **P L D 1997 Kar. 311 (b).**

'Dominion over property' : If a clerk or servant who has dominion over the property of his master in some way or other misappropriates or converts to his own use property he commits criminal breach of trust. For instance, where it is the duty of a Municipal Water Works Inspector to supervise and check the distribution of water from the Municipal waterworks he has dominion over the water belonging to his employers. If he deliberately misappropriates such water for his own use or for the use of his tenants for which he pays no tax and gives no information to his employers, he is guilty of criminal breach of trust.

Where the appellant deposited amounts allegedly misappropriated by him for which he could be convicted for temporary embezzlement if it was proved that he intended by delayed deposit to cause wrongful gain to one person and wrongful loss to another person. The Trial Court basing his judgment on evidence did not impute such intention to the appellant, and he was acquitted. Order of Trial Court was maintained by way of extension of benefit of doubt. **1980 S C M R 402.** Where the accused was under-trial for criminal breach of trust under Section 408, P.P.C. and the Magistrate permitted the accused to summon witnesses in defence on payment of diet money and process fee but afterward without any justification and without affording him an opportunity to show that money misappropriated was deposited by him he closed the defence case. Prosecution witnesses were also not examined by the Trial Court. It was held that the judgment of Trial Court suffered from manner irregularity and conviction set aside in the circumstances. **1977 P Cr. L J 641.**

409. Criminal breach of trust by public servant, or by banker, merchant or agent : Whoever being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Scope : This section relates to commission of breach, trust, public servants, bankers, merchants, factors, brokers, attorneys and agents.

From sustaining a charge of criminal breach of trust it is not necessary that misappropriation in fact must be proved. If in the circumstances of the case or by long lapse of time, the prosecution is not able to trace the misappropriated property or to produce evidence of the manner in which the misappropriation of conversion in fact took place, it cannot be said that the prosecution must fail even if there is other evidence in the mode to the conclusion that the property which was entrusted to be employed or over which he had domain and which was found missing, was misappropriated by him. **P L D 1965 Kar. 155.**

Person employed by undertaking, while it was privately owned, continuing in service after purchase of is a undertaking by Government. **P L D 1963 Kar. 26.**

'In capacity of public servant' : It is not necessary that the property should be that of Government, but that it should have been entrusted to public servant in that capacity.

It was contended that it was not one of the prescribed official duties of the petitions to receive the amounts in cash direct from the *Lambardar* but it has been found, as a fact, that a practice had grown for the *Lambardar* to pay the amounts in cash to the Wasil Baqi Navis instead of taking the trouble of going through the formalities themselves. The High Court observed that if the petitioner had held the office of Wasil Baqi Navis and was merely an ordinary citizen, few *Lambardars* would have reposed confidence in him so as to hand over to him the Government dues collected by them from the land-owners. The High Court further took note of the fact that according to Section 409 of the Pakistan Penal Code the ingredient of the offence is entrustment of the property to the public servant in any manner. Section 409 of the Pakistan Penal Code opens with the words "whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant....." The question is whether the words "in his capacity of a public servant" necessarily relate to the written charter of his duties as such public servant, or whether they would embrace even those actions which have come to be performed by the public servant in accordance with the accepted practice of the post, appointment or department concerned. It was held that there is no rational basis for drawing a line between the entrustment which takes place in accordance with the prescribed duties, and that which is made in accordance with the accepted practice relating to the post or appointment held by the public servant. In both cases the entrustment takes place in his capacity of a public servant dealing with property in question in relation to his official functions. Both situations would thus be covered by the provisions of Section 409 of the Code. The section would not of course extend to entrustment of property which has no connection whatsoever with the official capacity of the public servant as such. **1973 S C M R 375.**

Bail, grant of : Matter having been brought to the notice of the Chief Executive of the Bank, accused could not unilaterally pass an order to freeze the Bank Accounts, nor he was shown to have any legal duty or obligation to do so, he however, on the direction of the Chairman at once complied with the order for freezing the Bank Accounts. Accused was not concerned either in the matter of issuance of a cheque book to co-accused and making entries for transfer of accounts, or opening of Bank Account in the name of co-accused and

withdrawal of Rs. 20 lacs from the same. Accused had not signed any forged cheque or document and no financial loss was caused to the Bank by any act or omission on his part. No reasonable grounds, thus, existed to believe at such stage that the accused had committed the alleged offences and case against him needed further inquiry. Accused was admitted to bail in circumstances. **1996 P Cr. L J 1279.**

Leave to appeal was granted by Supreme Court to consider whether criminal miscellaneous application for release of the amount deposited by the accused in his bail application, was maintainable and whether High Court could pass the impugned order allowing the said application under S. 516-A or under S. 561-A or under any other provisions of the Criminal Procedure Code or under any other law in a bail application which had already been disposed of. **1998 S C M R 1758.**

Misappropriation with dishonest intention necessary for conviction : In order to secure a conviction for an offence of criminal breach of trust, it must be shown in all cases that there was dishonest intention on the part of the person to whom the property was entrusted. A mere refusal on the part of an agent to render accounts or to pay the money due is not enough to bring him within the mischief of Section 409, P.P.C. In other words the misappropriation of the entrusted property must be shown to be with dishonest intention. Where the relationship of principal and agent was established between the parties in 1950, and it is the complainant's case that for five years the work proceeded smoothly and the trouble arose only when the complainant opened a second agency at Faisalabad and did not accede to the request of the respondent to close down that agency. It was the assertion of the petitioner-complainant himself that the respondent got annoyed at the opening of the second agency and refused to render accounts for that reason: it was *held that* the reason for the refusal of the respondent to render accounts was not related to any dishonest intention on his part. **P L D 1960 Lah. 1060.**

Accused had actually submitted the vouchers showing the expenditure of the amounts entrusted to him which had been entertained by the Municipal Committee and were under scrutiny for approval. Said vouchers, if ultimately found to be correct, would make conviction of accused groundless. Allegations of misappropriation of the amounts against accused having not been proved beyond reasonable doubt at the judgment stage, Trial Court should have given the benefit of doubt to him. Accused was acquitted on benefit of doubt in circumstances. **1997 M L D 1723.**

The appellant was charged for misappropriation of an amount of Rs. 3445.87. The Trial Court arrived at the conclusion that actually he had misappropriated only Rs. 130 in respect of salary of a *chowkidar*. He was convicted on the ground that the voucher to whom the salary was purported to be paid was not signed by the *chowkidar*. Neither *chowkidar* made a complaint nor he was produced by the prosecution. In the circumstances conviction was *set aside*. **P L J 1982 C R C 20.** Where the accused by misuse of his position as Secretary of a Co-operative Society obtained money from a Bank through forgery and fraud and contended that there was no entrustment of money by the Bank to the accused and it being so offence was not covered by Section 409, P.P.C. The contention was repelled observing that the acts done by the accused petitioner which have been proved on record clearly show that he had dishonestly induced the Bank with the help of his co-accused to deliver the money to his co-accused whom he identify as the real treasurer of society. It was *held that* conviction for criminal breach of trust was rightly passed. **1982 S C M R 748.**

Prosecution in order to establish the charge of criminal breach of trust must prove not only entrustment of or dominion over the property but also that the accused had either dishonestly misappropriated, converted, used or disposed of such property himself or had wilfully suffered some other person to do so. **1995 P Cr. L J 1717.**

Prosecution has to succeed on its own merits and prove its case against accused beyond reasonable doubt and every doubt has to be resolved in favour of accused. **1995 P Cr. L J 1717.**

Neither any forged document had been prepared, nor any amount had been misappropriated. Case simply involved double payment by mistake and the person to whom double payment was made had since refunded the amount. Even otherwise sanction orders of prosecution of accused were defective and had been issued mechanically without conscious application of mind and Trial Court in the absence of a valid sanction had no jurisdiction in the matter. Accused were acquitted in circumstances. **1995 P Cr. L J 1403.**

Burden of proof : Despite existence of circumstances giving rise to adverse presumption, the onus *probandi* would still rest squarely on the shoulders of the prosecution. **1994 P Cr. L J 1116.**

Punishment : Criminal breach of trust by a person in charge of public money calls for a severe sentence. **P L D 1969 Pesh. 18 ; P L D 1969 Lah. 217.**

Quashing of proceedings : Accused admittedly had not moved the Trial Court for acquittal under Section 249-A, Cr.P.C. where the case was pending. Even if the F.I.R. was got registered at the direction of the High Court, the mandatory provisions of Section 249-A, Cr.P.C. could neither be ignored nor violated and Trial Court should have been moved in the first instance under said provision. Petition for quashing of proceedings filed under Section 561-A, Cr.P.C., therefore, was not maintainable and the same was dismissed accordingly. **1996 M L D 1368.**

Administration of criminal justice--Principles: Any admission or confession made by accused has to be taken into consideration in entirety and if any explanation is given by accused, prosecution is bound to prove the same as wrong. Court is also under an obligation to take such explanation into consideration. **1998 PCr.LJ 2042 (b).**

Criminal breach of trust : Burden of proof. Mere entrustment of property to the accused and its shortage would not be enough to establish offence of criminal breach of trust under S. 409, P.P.C. Onus is always on the prosecution to prove that accused had dishonestly misappropriated the property or used the same to his benefit. **1998 PCr.LJ 2042 (a).**

Special Judge's appointment not lawful--Effect: Special Judge having not completed the probationary period as an Additional Sessions Judge and having been removed from service, was not eligible to be appointed as a Special Judge Anti-Corruption as contemplated by S. 3 (2) of the Pakistan Criminal Law Amendment Act, 1958. Convictions and sentences awarded to accused by the Special Judge were consequently set aside and the cases were sent back for *de novo* trial and decision on merits afresh by a competent Court. **1998 PCr.LJ 104.**

Of Receiving of Stolen Property

410. Stolen property : Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as stolen property, "whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without Pakistan. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof it then ceases to be stolen property.

411. Dishonestly receiving stolen property : Whoever dishonestly receives or retains, any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

Scope : Section 410 explains what comes under the words 'stolen property'. Things which have been stolen, extorted, or robbed, or which have been obtained by criminal misappropriation or criminal breach of trust come under the extended signification given to these words.

Section 411 clearly shows that besides dishonest possession of stolen property there must also be the knowledge of or at least reasonable belief in the property being stolen property, but when some property is proved to be stolen property and the person who is found in possession of it cannot account for its possession especially when he is found in possession of it soon after the theft of the property, it is only reasonable to conclude not only that he was in possession knowing or having reason to believe it to be stolen property but also that this possession of it was dishonest.

Trial Court had acquitted the accused of the charge under Section 392, P.P.C. read with Section 17 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, but relying upon the recoveries and identification convicted them under Section 412, P.P.C. *Held*, prosecution had failed to establish its case against accused under Section 412, P.P.C. beyond reasonable doubt. Conviction of accused under Section 412, P.P.C. was converted to Section 411, P.P.C. in circumstances and their sentence was reduced to the imprisonment already undergone by them. **1995 PCr.LJ 847.**

Knowing or having reason to believe : The wording of this section is designed to cover the case of a dishonest receiver of stolen property. It cannot, or should not be used against person in possession of stolen property, unless the possessor has guilty knowledge at the time he becomes the possessor, or even subsequently, that the property was stolen. Circumstances may be suspicious, but the onus of proving guilty knowledge cannot be taken away from the prosecution. Under this section it has been frequently *held* that the word 'believe' is of very much stronger application than the word 'suspect'. However great the suspicions of a man may be that the property of which he has become the possessor may have been stolen property, this in itself would be insufficient to fulfil the two ingredients required under Section 411, Pakistan Penal Code. The word 'believe' must be interpreted as meaning believe which would come to a man of reasonable mind. A reasonable man must have felt convinced in his mind that the property with which he was dealing was stolen property and that it would not be sufficient in such a case to show that the accused person was careless, or that he had reason to suspect that the property was stolen or that he did not make sufficient inquiries to ascertain whether it had been dishonestly acquired. The onus of proof in a case of this nature cannot shift from the prosecution to the accused, and that it is not necessary for an accused person to prove affirmatively that he came by the goods innocently. It has been held, that if he can give explanation which might raise doubt in the mind of the Court as to his guilt he will be entitled to the benefit of the doubt. **P L D 1951 Bal. 14.**

Protection against double punishment : Conviction for the second time on the same facts, not legal. Accused had been convicted and sentenced by the Special Judge, Anti-Corruption under S. 411/468, P.P.C. read with S. 5(2) of the Prevention of Corruption Act, 1947 in a case registered for theft of a motorcycle. Earlier accused had already been tried and acquitted by the Magistrate in a case registered regarding the theft of the same motorcycle under S. 379, P.P.C. and S. 14 of the Offence Against Property (Enforcement of Hudood) Ordinance, 1979. *Held*, Art. 13 of the Constitution had offered a complete protection to the accused and the Exceptions set out in S. 403, Cr.P.C. as such could not be read to whittle down the effect of the Constitutional guarantee. Accused having once been acquitted by a Court of competent jurisdiction and such finding having attained finality, his conviction on the same facts again by the Special Judge, Anti-Corruption, was not permissible. Accused was acquitted accordingly. **P L D 1998 Lah. 307.**

Manual possession not necessary to constitute this offence : It is not necessary that the accused should have had manual possession of the goods; but directing a servant to

dispose them of as by pawning or otherwise, will be sufficient to support the charge. Where stolen property was brought by the thief into A's shop and A, with guilty knowledge, called her servant and directed her to take the stolen goods to the pawn office and "pawn them for the girl" (the thief), and the servant did not so accordingly and brought back the money, which she handed to the thief in her mistress's presence, it was held, that this amounted to a receiving by A of the stolen property, though she had never the manual possession of either the goods or the money. **24 L J M C 135.**

Robbed vehicle was recovered soon after commission of robbery and, in-between, it was not received or retained dishonestly by any body to constitute offence under Section 411, P.P.C. Once commission of robbery had taken place and incriminating robbed vehicle had not yet been transferred to some one who had received said vehicles dishonestly or having reason to know to believe the same to be stolen property, offence under Section 411, P.P.C. was not constituted. **1998 M L D 518.**

Joint possession : In a house occupied by a joint family including several male and female members certain stolen property was found in a locked box, the key of which was in the possession of the wife of one of the men who, however, was not in the house. The husband was convicted under this section. It was *held that* it could not be presumed that in every case of this kind the possession of the wife is *per se* the possession of the husband, and as there was nothing to connect the husband with the possession beyond the mere fact that he was the husband of the woman who had the key of the box, the conclusion that he was in possession of the property was not justified. **27 Cr. L J 249.**

Recoveries had been made at the pointation of accused : Recovery memo. showed the special knowledge of the accused of the place where the stolen ornaments had been secretly kept. No misreading or non-reading of any material piece of evidence could be pointed out. Reappraisal of evidence could not be sought at such stage. Accused having undergone substantial part of their sentence, substitution by Supreme Court its view for the view which prevailed with the Courts below, was not justified. Conviction and sentence of accused were upheld in circumstances, benefit of Section 382-B, Cr.P.C. was, however, extended to them. Petition for leave to appeal was disposed of by Supreme Court accordingly. **1998 S C M R 1367.**

Mere possession of stolen property by accused, by itself not sufficient to prove participation in offence of theft. Prosecution still bound to prove possession of such property having connection with actual offence of theft. **P L D 1978 Lah. 1087.**

Conviction of accused on the statement of Police Officer alone, was not sustainable. **1984 P Cr. L J 1651.**

The accused admitted the recovery of stolen property from his possession. Effect of 'non-production' of stolen property in Court, held to be neutralising. The conviction was maintained. **1984 P Cr. L J 1411.**

412. Dishonestly receiving stolen property in the commission of a dacoity : Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Object : The object of this section is to stamp out the offence of dacoity which was very common when the Code was enacted.

This section refers to persons other than the actual dacoits. It implies receipt from another person or an act by one not himself the dacoit. The receiver is punishable under it as severally as those who commit dacoity. The offence under this section is much more serious than the offence under the preceding section.

Mere recent possession of property taken in dacoity does not necessarily lead to the presumption that the person in possession is guilty under this section. **P L D 1965 Dacca 204.** In most cases the presumption would be of an offence under Section 411. **P L D 1957 Lah. 261.**

Trial Court had acquitted the accused of the charge under Section 392, P.P.C. read with Section 17 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, but relying upon the recoveries and identification convicted them under Section 412, P.P.C. *Held*, prosecution had failed to establish its case against accused under Section 412, P.P.C. beyond reasonable doubt. Conviction of accused under Section 412, P.P.C. was converted to Section 411, P.P.C. in circumstances and their sentence was reduced to the imprisonment already undergone by them. **1995 P Cr. L J 847.**

413. Habitually dealing in stolen property : Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Scope : This section punishes severely the common receiver or professional dealer in stolen property. One who casually receives stolen property is punished under the two preceding sections.

414. Assisting in concealment of stolen property : Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

This section punishes those acts of receiving or retaining stolen property which do not come under the purview of Sections 411, 412 and 413.

Scope : This section is intended to apply to cases where there has not been such a possession as would support an indictment against the party, as a receiver, under Section 411. "When a person is shown to stand in such a relation to stolen property as falls short of possession by him of such property, his manner of dealing with the property may warrant a charge of assisting in concealing or disposing of or making away with the property, with a guilty knowledge." The section applies only where there was no actual receipt of the property. A person receiving stolen articles could be convicted of concealing or disposing of them.

Ingredients : This section requires two things :--

- (1) Voluntarily assistance in concealing or disposing of or making away with property.
- (2) Knowledge or reason to believe that such property is stolen property.

Of Cheating

415. Cheating : Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person ¹[or any other person] in body, mind, reputation or property, is said to "cheat".

Explanation : A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay, A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z, into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds articles which it knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A, intentionally deceives Z, into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money; A not intending to repay it. A cheats.

(g) A, intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contact and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

COMMENTS

Scope : There is nothing in this section to exclude from the scope of its provisions cheating which has relation to immovable property. The presentation which must be fraudulent or, dishonest and which must have induced the person deceived to deliver property may as

1. Subs. by the Pakistan Penal Code (Amdt.) Ordinance, XLI of 1980.

well be perpetrated in relation to immovable property as to movable property. It is true that so far as that part of the section which relates to dishonest concealment of facts is concerned, it must be read subject to the qualification that there is no duty on a seller to disclose defects in title in immovable property which the buyer with ordinary care could discover. **P L D 1965 Lah. 676.**

Ingredients : This section requires--

1. Deception of any person.

2. (a) Fraudulently or dishonestly inducing that person:

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not to do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Deception : Dishonest concealment of facts is a deception within meaning of Section 415, P.P.C. **1995 S C M R 1249.**

Sections 415 and 420--Cheating : An inducement to do something does not come within the mischief of Section 415 or 420, P.P.C. unless it is made with a dishonest and fraudulent intention from the very beginning. Even if it be admitted that the accused petitioner had induced the complainant to shift his machinery to K on the ground that it would fetch much more for profit in that city. There was no indication on the record that he intended to sell all the machinery from the very beginning and had never intended to work it at K. It is equally possible that he had expressed this view generally as K was admitted to be a rich city. This view was reinforced by the fact that complainant had himself stated that he had personally taken the machinery and had himself fitted it at K and that he even worked it for a few days but had to leave suddenly due to illness. As a result it was clear that he never parted with the possession of the property or delivered it to accused/petitioner as a result of the inducement. The complainant went back to W and left the machinery in the custody of the accused/petitioner. From that time onward the property was lying as a trust with accused and its sale by the latter to another person amounted to an offence of criminal misappropriation or breach of trust. **1974 P Cr. L J Note 81 at p. 51.**

Cheating and breach of contract : The distinction between mere breach of contract and cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act but of which the subsequent act is not the sole criterion. Mere breach of contract cannot give rise to a criminal prosecution.

Cheating and extortion : The offence of cheating must, like that of extortion be committed by the wrongful obtaining of a consent. The difference is, that the extortioner obtains the consent by intimidation, and the cheat by deception.

416. Cheating by personation : A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation : The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

COMMENTS

Ingredients : This section requires any one of the following essentials :--

1. Prevention by a person to be some other person.
2. Knowingly substituting one person for another. **P L D 1967 Dacca 826.**
3. Representation that the person representing or any other person is a person other than he or such other person really is.

"To personate" means to pretend to be a particular person. "As soon as a man by word, act, or sign holds himself forth as a person entitled to vote with the object of passing himself off as that person, and exercising the right which that person has, he has personated him." If a person at Oxford, who is not a member of the University, go to a shop for the purpose of fraud, wearing a commoner's cap and gown, and obtain goods, this appearing in a cap and gown is a sufficient cheating although nothing passed in words.

False personation at examination : Where A falsely represented himself to be B at a University Examination, got a half-ticket under B's name, and wrote papers in B's name, in was held that A had committed the offence of forgery and cheating by personation.

Liability of companies : Company although distinct legal entity and quite different from its members, including directors, yet could act only through its directors and officers. Allegation of criminal offence against company can only mean alleged offence having been committed by its directors or officers. Court in order to decide as to who committed such offence is always required to pierce veil of incorporation. Commission of a criminal offence by a company is not inconsistent with *mens rea* on part of its directors. **1981 S C M R 573.**

417. Punishment for cheating : Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENTS

Scope : This section punishes simple cases of cheating. When there is delivery of any property or destruction of any valuable security, Section 420 is the proper section to apply. The offence under this section is non-cognizable, the one under Section 420 is cognizable.

Appeal against acquittal—Principles : In the case *Ghulam Sikendar and another v. Mamriz Khan others* **P L D 1985 SC 11** wherein the then Chief Justice Muhammad Afzal Zullah has formulated following principles on the question in issue:

"However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualised from the cited and other cases-law on the question of setting aside an acquittal by this Court. They are as follows:-

- (1) In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different than that in an appeal against conviction when leave is granted only for the re-appraisal of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well-accepted presumptions: One initial, till found guilty, the accused is innocent; and two that again after the Trial a Court below confirmed the assumption of innocence.
- (2) The acquittal will not carry the second assumption and will also thus loose the first one if on points having conclusive effect on the end result the Court below; (a) disregarded material evidence; (b) misread such evidence; (c) received such evidence illegally.

- (3) In either case the well-known principle of re-appraisal of evidence will have to be kept in view when examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observances of some higher principle as noted above and for no other reason.
- (4) The Court will not interfere with acquittal merely because on reappraisal of the evidence it comes to conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If, however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualised in these cases in this behalf was that the finding sought to be interfered with after scrutiny under the foregoing searching light should be found wholly as artificial, shocking and ridiculous." 1997 PCr. LJ 1421.

Attempt to cheat : In a prosecution on a charge attempting to cheat a certain person, that person need not be the complainant. P L D 1968 Lah. 451.

418. Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect : Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound either by law, or by legal contract, to protect shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

Scope : This section applies to cases of cheating by a guardian, a trustee, a solicitor, an agent, or by directors or managers of a bank in fraud of the shareholders. It is the abuse of trust that is vested with severe punishment. A Muslim, who represents himself to be a Hindu for the purpose of getting an employment with Hindu, who would not employ a Muslim, commits an offence under this section.

419. Punishment for cheating by personation : Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to ¹[seven] years, or with fine, or with both.

COMMENTS

Scope : This section provides punishment for the offence described in Section 416. P L D 1966 Lah. 330.

Suits for restitution of conjugal rights and jactitation of marriage were pending between the parties basing on the genuineness or otherwise of the Nikahnama. Same fact was to be determined in the criminal proceedings initiated by means of the impugned F.I.R. as the dispute in the civil and criminal matter was directly and substantially the same. Civil Court/Family Court being the proper forum for the determination of civil rights of the parties revolving around their alleged matrimonial relations, criminal proceedings arising out of the said F.I.R. were stayed till the final disposal of the civil litigation between the parties. 1995 P Cr. L J 1957.

1. Subs. for "three" by Criminal Law (Amendment) Ordinance, XXXIII of 1981.

Quashing of FIR : Prosecution had strong *prima facie* case to prove that foreign exchange account-holders whose names had been used for opening the accounts were fake persons and in view of the evidence so far collected by the Investigating Agency process of law could not be stopped from having its course. Investigation of the case was in progress. Quashing of F.I.R. was declined in circumstances. **1995 P Cr. L J 1224.**

Leave to Appeal : According to the case of *Resham Jan alias Noor Jehan v. State*, **1996 S C M R 1094.** all the three Courts below had found the accused guilty of the charges of personation and forgery. Such concurrent findings were not liable to be interfered with in the absence of plausible ground. Leave to appeal was refused in circumstances.

420. Cheating and dishonestly inducing delivery of property : Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Object : Simple cheating is punishable under Section 417. But where there is delivery or destruction of any property or alteration or destruction of any valuable security resulting from the act of the person deceiving, the proper section to apply is this section and not Section 417. Section 417 covers cases of cheating in which though there is fraud yet there is no intention of causing wrongful loss, or wrongful gain. The word 'fraudulently' is not used in Section 420.

Difference between Section 417 and Section 420 : The difference between Section 417 and Section 420 is that, where, in pursuance of the deception, no property passes, the offence is one of cheating punishable under Section 417, but where, in pursuance of the deception, property is delivered, the offence is punishable under Section 420. **P L D 1958 Lah. 738.**

The ingredients of offences under Sections 420, 403 and 406, P.P.C. are to a substantial extent available in most cases of breach of contract. Similarly a default by a borrower in repayment of a debt without admission of liability may also frequently partake of the character of an offence under Section 406, P.P.C. There are numerous other instances of defaults in transactions purely civil in nature but which often appear to answer fully the ingredients of a criminal offence; and with a little clever glossing over every such case could be converted into an earnest prosecution. It is here that a Court is called upon to act with circumspection and to exercise the utmost care and caution before it is persuaded to employ its process for compelling attendance. This duty is heavier in private complaints which relate to transactions apparently civil in nature. The tendency to view a criminal action as a handy means to constrain a person's conduct cannot be under-scored. We are still left with people in this country who are prepared to pay a price for their fair name and the spectre of a criminal prosecution can often compel them easily to relent on a stand which is otherwise well founded in law and in equity. It is this growing abuse of the process of a Criminal Court that has to be guarded against. The difficulty for the Court itself often arises on account of the overlapping nature of a civil and criminal cause. But yet with a prudent application of mind it should be possible to draw a distinction between the two. It is perhaps well to remember that the word "crime" suggests that not only should a man have brought about the forbidden actus but also that the line of conduct which he had voluntarily continued to, that conclusion was inspired, or at least accompanied, by *mens rea*. The accused, in other words, shall have been actuated by a legally reprehensible attitude of mind. **1972 P Cr. L J 1130.**

The word "fraudulently" is not used in Section 420. Complaint of cheating can be lodged by any person and not necessarily by the person actually defrauded. **P L D 1963 Dacca 357.**

Cheque cases : Where a post-dated cheque given by the accused in repayment of money was returned dishonoured by the Bank it was *held that* mere dishonour was not sufficient to sustain the cheque of cheating. **P L D 1963 Kar. 54.**

Liability was merely on ground of cheque being dishonoured in civil liability and not criminal liability. **1971 P Cr. L J 943.**

The accused petitioner was not given sufficient opportunity of appearing and explaining allegations against him. Some co-accused were not arrested by the Police while others including main accused obtained bail before arrest. So it was *held that* the accused petitioner was also entitled to bail in circumstances of case. **1982 S C M R 948.**

The very act of raiding the premises of the accused's petrol pump and getting samples by Naib-Tehsildar was without lawful authority because the Naib-Tehsildar was neither an "Authority" under the relevant Rules nor he was authorized by the "Authority" to raid the said premises and get the samples. No possibility of the conviction of the accused existed even if the trial of the case was allowed. Proceedings pending against the accused in the Court of Magistrate were quashed in circumstances. **1995 P Cr. L J 404.**

F.I.R. had been lodged relating to the plot after a period of four years without mentioning the finality of the decree passed by a competent Civil Court on the basis of agreement to sell in favour of the accused and against the complainant. An application under Section 12(2), C.P.C. on behalf of the complainant was also pending in the Civil Court which was the proper forum to decide the issue and if it found the agreement to sell in question to be a forged one, it could *suo motu* initiate proceedings under Sections 195 and 476, Cr.P.C. as the police was not competent to take cognizance of an offence committed during judicial proceedings before a competent Court. F.I.R. was quashed in circumstances. **1995 P Cr. L J 1668.**

Civil proceedings were pending against the accused and other Directors of the two Companies in the Court of Justice Queen's Bench Division London and prosecution of accused in Pakistan for cheating the Bank or fabricating false documents was, therefore, highly doubtful. Main accused in the case having been acquitted by High Court and Trial Court, accused could not be tried on the same charge. Accused was a British National and the transactions in respect of sanction of loans and the documentation, therefore, having taken place in England, continuation of proceedings against the accused in the case amounted to abuse of process of Court which could not be allowed to perpetuate. Even otherwise if the prosecution was allowed to lead the evidence at the trial against the accused, he was not likely to be convicted as the main accused had already been acquitted of the charge. Proceedings pending against the accused were quashed in circumstances. **1995 P Cr. L J 1279.**

The accused accepted his liability and issued three post-dated cheques but all were dishonoured. Inability was held to pay up debt. It was *held that* it did not prove *mens rea* and the transaction was one of civil nature. **P L D 1978 Lah. 521.**

The accused was only responsible for preparing disputed bill and further nothing on record to prove that accused had any connection with the cashier who drew amount of disputed bill and was to make disbursement among the persons concerned. The conviction and sentence were set aside in circumstances. **1984 P Cr. L J 678.**

Cheating and dishonestly inducing delivery of property--Essentials: Prosecution, in order to attract S. 420, P.P.C., must prove that the accused has cheated the complainant and that he, by such cheating, has induced the complainant to deliver any property to any person. **1998 P Cr. L J 347.**

Of Fraudulent Deeds and Dispossession of Property

421. Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors : Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Object : This section punishes fraudulent debtors especially in connection with to frauds connected with insolvency. The offence consist in a dishonest disposition of property with intent to cause wrongful loss to the creditors.

422. Dishonestly or fraudulently preventing debt being available for creditors : Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debt or the debts of such other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section, like the preceding one, is intended to prevent the defrauding of creditors by making property. Any proceeding to prevent the attachment and sale of debts due to the accused will fall under it. The offence consists in the dishonest or fraudulent evasion of one's own liability.

Where the offence under Sections 406 and 422, P.P.C. were allegedly occurred at a place where the Court to which the complaint was lodged had no territorial jurisdiction. The question to be determined was of jurisdiction whether the Court at Hyderabad had the jurisdiction to entertain the complaint and issue process against the applicants when the alleged offences have taken place at Sukkur. It was *held that* Section 179, Cr.P.C. contemplates cases where the act done and the consequences ensuing therefrom, together, constitute the offence which was complete in itself. In the circumstances of the case, proceedings in the lower Court were quashed. **1980 P Cr. L J 594.**

423. Dishonest or fraudulent execution of deed of transfer containing false statement of consideration : Whoever dishonestly or fraudulently signs, executes or becomes a party to any deed or instrument which purports to transfer or subject to any charge of any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

424. Dishonest or fraudulent removal or concealment of property : Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or

claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Scope : This section provides for cases not coming within the purview of Sections 421 and 422. It contemplates such a concealment or removal of property from the place in which it is deposited, as can be considered dishonest or fraudulent, whether the fraud is intended to be practised on creditors or partners.

Of Mischief

425. Mischief : Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

Explanation 1 : It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2 : Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

(a) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(b) A introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(c) A voluntarily throws into a river a ring belonging to Z with the intention of thereby causing wrongful loss to Z, A has committed mischief.

(d) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.

(e) A having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(f) A causes a ship to be cast away, intending thereby to cause damage to Z, who has lent money on bottomry on the ship. A has committed mischief.

(g) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(h) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has committed mischief.

426. Punishment for mischief : Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

COMMENTS

The section deals only with a physical injury from a physical cause.

Ingredients : This section necessitates three things :--

1. Intention or knowledge of likelihood to cause wrongful loss or damage to the public or to any person.
2. Causing the destruction of some property or any change in it or in its situation.
3. Such change must destroy or diminish its value or utility or affect it injuriously.

Intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person : This section requires merely that there should be an invasion of right and diminution of the value of one's property caused by that invasion of right, which must have been contemplated by the doer of it when he did it. The damage need not necessarily consist in the infringement of an existing right but may be caused by an act done with the intention of defeating and rendering infructuous a right about to come into existence. Where some persons belonging to one village pulled up and removed fishing stakes lawfully fixed in the sea within three miles of the shore by the villagers of another village, and the removal of the stakes, though without any intention to appropriate them, occasioned "damage", it was *held* that the offence amounted to mischief. A dominant owner, having a right of way over land belonging to another, has no right himself to remove an obstruction unless his right of way is impaired by it. If he does so, he has employed unlawful means and if loss of property is caused thereby to another, he is guilty under this section.

Causes the destruction of any property or any such change in any property, etc. : It is the essence of this offence that the perpetrator must cause the destruction of property or such change in it as destroys or diminishes its value or utility.

427. Mischief causing damage to the amount of fifty rupees : Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Non-framing of a proper charge by Trial Court and failure of stating the manner of deception had made the entire proceedings null and void. Civil controversy had been converted into criminal proceedings without examining the crux of the matter by Trial Court which had not only resulted in grave miscarriage of justice, but had also made the accused to suffer agony of a protracted Trial and remand of case, in circumstances, could not serve any useful purpose. Sessions Court had simply toed the line ill-foundedly drawn by the Trial Court and decided the appeal arbitrarily without having gone through the record and its judgment was violative of the provisions of Section 367, Cr.P.C. Sale of land having been made bona fide, *mens rea* was lacking in the case and question of conviction did not arise. Accused was acquitted in circumstances. **1998 M L D 1838.**

428. Mischief by killing or maiming animal of the value of ten rupees : Whoever commits mischief by killing, poisoning, maiming or rendering useless any animal of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

429. Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees : Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with both.

430. Mischief by injury to works of irrigation or by wrongfully diverting water : Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENTS

Scope : This section deals with diminution of water supply. Section 278 applies if the water is spoiled so as to be unfit for use.

For a conviction under this section there must be some infringement of right resting in some one by the act of the accused. It must be proved that the accused had no right to do what they did. This section only applies if mischief, within the meaning of Section 425, is committed. **A I R 1936 Lah. 15.**

The section applies equally to irrigation channels as to other sources of irrigation, such as tanks and pound.

According to the case of *Talib Hussain v. State*, case resting on allegation that on relevant date and time accused appeared on scene armed with deadly weapon and disallowed complainant to take water as per his turn. Accused contending that prosecution had not brought on record evidence of turn of water of complainant at relevant time and that land of Killa where occurrence took place belonged to accused which indicated that it was not turn of complainant. It was held that

- (i) Ownership of land of Killa had nothing to do with prosecution case that accused had forcibly interfered and deprived complainant from use of water and there was no use of water and there was no valid reason to interfere with conviction recorded under Section 430.
- (ii) Sentence of 6 months' R.I. merited reduction to sentence already undergone as convicts had faced agony of protracted trial. **N L R 1994 Cr. L J 113.**

Where the law bound the landlord to make arrangement for the supply of drinking water to his tenants but he neglected to make such arrangements he was held to have committed an offence under this section. **P L D 1959 Kar. 392.**

Offender under Section 430, P.P.C. not liable under Section 379, P.P.C. Section 430, P.P.C. has a special/distinct legal entity and one who violates the same is not liable under Section 379, P.P.C. **P L D 1997 Lah. 689.**

431. Mischief by injury to public road, bridge, river or channel : Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

COMMENTS

To support of a conviction under this section there must be evidence of intention to cause mischief, and of knowledge that injury is likely to result from the act of the accused. **(1883) 1 Weir 510.** Such intention or knowledge is not necessary for offences under Sections 279, 280 and 293.

432. Mischief by causing inundation or obstruction to public drainage attended with damage : Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation or an

obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

433. Mischief by destroying, moving or rendering less useful a light-house or sea-mark : Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, sea-mark, buoy or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

434. Mischief by destroying or moving, etc., a land-mark fixed by public authority : Whoever commits mischief by destroying or moving any landmark fixed by the authority of a public servant, or by any act which renders such landmark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

435. Mischief by fire or explosive substance with intent to cause damage to amount of one hundred rupees or (in case of agricultural produce) ten rupees : Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause damage to any property to the amount of one hundred rupees or upwards ¹[or (where the property is agricultural produce) ten rupees or upwards] shall be punished with imprisonment of either description for a term which ¹[shall not be less than two years nor more than] seven years, and shall also be liable to fine.

COMMENTS

Appeal against acquittal : Extra-judicial confession was allegedly made by accused about six weeks after the occurrence to a stranger who was hardly in a position to assist him. Evidence relating to the recoveries was doubtful and the last seen evidence was unsatisfactory. High Court, therefore, was right in not relying upon such evidence and was justified in acquitting the accused. Leave to appeal was refused in circumstances. **1997 S C M R 532.**

Quashing of proceedings : Only allegation against accused was that he was found standing alongwith the co-accused at the time of his arrest. Accused was neither armed nor he was shown to have taken any part in the incident. Witnesses in their statements recorded under Section 161, Cr.P.C. also did not involve the accused in the case. Making the accused to face the trial in the case would amount to abuse of the process of law in circumstances. Case against accused was consequently quashed. **1997 M L D 2529.**

436. Mischief by fire or explosive substance with intent to destroy house, etc. : Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property shall be punished

1. Subs. for 'may extend to' by the Criminal Laws (Amdt.) Ordinance, III of 1980.

with imprisonment for life, or with imprisonment of either description for a term which ¹[shall not be less than three years nor more than] ten years, and shall also be liable to fine.

COMMENTS

Object : This section punishes mischief by fire or explosive substance. Owing to the serious nature of the means employed the punishment is severe.

Conviction--Acquittal : Prosecution produced oral evidence to the effect that one accused sprinkled the Kerosine oil while other set the same on fire. Neither Jeerican in which Kerosine oil alleged to had been brought nor any burnt article was taken into possession. F.I.R. recorded two days after alleged occurrence Police declared accused persons innocent. *Held:* Ocular evidence does not inspire confidence. Conviction and sentence set aside. Accused acquitted. **K L R 1996 Criminal Cases 613.**

The accused were prosecuted under Sections 302, 307, 436 and 395 read with Sections 148 and 149, P.P.C., and were convicted for multiple murder and other offences. The Trial Court acquitted three out of six accused by giving them benefit of doubt. The High Court on appeal, acquitted yet another accused by giving benefit of doubt. However, conviction of two accused was confirmed. All the eye-witnesses deposed that they identified all the accused in light of fire raging all around the house set on arson. The contention as to identification of the accused being not possible in view of the topsy-turvy condition was held to be without any merit. Eye-witnesses claimed that they saw the occurrence by concealing themselves at a place which the accused did not see was held to be possible. It was *held that* High Court extended maximum benefit of all principles of criminal justice to the accused party in the circumstances of the case, benefit of doubt having been extended to the acquitted accused, appellant's claim to the extension of such benefit to them was held not sustainable. **1983 S C M R 48.**

437. Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden : Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

438. Punishment for the mischief described in Section 437 committed by fire or explosive substance : Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

439. Punishment for intentionally running vessel aground or ashore with intent to commit theft, etc. : Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

1. Subs. for 'may extend to' by the Criminal Laws (Amdt.) Ordinance, III of 1980.

440. Mischief committed after preparation made for causing death or hurt : Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

COMMENTS

Quashing of proceedings : Genuine controversy regarding the possession of land in relation to the offence of trespass as alleged in the F.I.R., existed between the parties which could only be resolved through a regular Trial after examining the prosecution as well as defence evidence. Accused petitioner had brought a separate complaint containing his cross version which was also awaiting Trial and it was too early to say that the case registered against accused *vide* impugned F.I.R. was either misconceived or amounted to the abuse of process of Court. Petition was dismissed accordingly. **1998 M L D 198.**

Of Criminal Trespass

441. Criminal trespass : Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

COMMENTS

Ingredients of the section : (1) Entry into or upon property in possession of another.

(2) If such entry is originally lawful, then remaining upon such property unlawfully.

(3) Such entry or unlawful remaining is with intent--

(a) to commit an offence; or

(b) to intimidate, insult, or annoy any person in possession of property.

This section defines 'criminal trespass', punishment for this is provided in Section 447.

"Property" : The word "property" in this section is wide enough to cover movable property into or upon which it is possible for a person to enter or upon entering remain, with the intention described in the section. **P L D 1959 Lah. 495.**

The offence can only be committed against a person who is in actual physical possession of the property in question. If the complainant is not in actual possession of the property this offence cannot be committed. But the offence may be committed even when the person in possession of the property is absent provided the entering into or upon the property is done with intent to do any of the acts mentioned in the section.

Joint possession : A joint owner of property is entitled to have joint possession restored to him in a Civil Court but he is not justified in taking the law into his own hands to recover possession. If he does so he is liable for criminal trespass. A joint owner of land who enters upon the land with the intention of knowledge of doing a wrongful act commits criminal trespass.

"Intent to commit an offence" : Criminal trespass depends on the intention of the offender. **P L D 1959 Lah. 495.** "Intention" must always be gathered from the circumstances of the case; and one matter which has to be considered is the consequences which naturally flow from the act, because a man is usually presumed to intend the consequences of his own act.

Nature of possession : This section contemplates a person in actual possession and not constructive possession. **P L D 1954 Pesh. 111.**

But this rule does not seem to be absolute and it had been held by general Courts that where a person enters upon the property in the possession of a tenant with the intention of committing an offence or to intimidate insult or annoy the tenant, the landlord may complain for criminal trespass. **23 Cr. L J 699**. It has also been *held* that a person may either be in physical possession of property or he may be in possession through his licensee or tenant.

'With intent to commit an offence or to intimidate, insult or annoy any person in possession of such property' : The word "intent" is not to be taken as identical with "wish" or "desire". The intention constitutes the entry criminal. Merely to trespass is not ordinarily such an offence; but when the trespass is in order to the commission of an offence, or when it is to intimidate, insult or annoy, it is punished. Thus, the essence of the offence is the intent in committing the trespass. **P L D 1965 Kar. 637**.

Quashment of proceeding : Ingredients of offence of criminal trespass not made out in F.I.R. or deposition of principal witness in case. No useful purpose would be served if proceedings allowed amount to abuse of process of Court. Proceedings under Section 447, P.P.C. quashed. **1983 P Cr. L J 42**.

Trespasser, could not claim right of private defence of his person unless he first brings to an end his own act of trespass. **P L D 1983 S C 135**.

It is not a mere civil trespass by way of taking possession of property without the consent of the person in possession which would amount to criminal trespass it is a condition precedent to constitute the offence of criminal trespass that it should be with intent to commit an offence or to intimidate, insult or to annoy person in possession of such property. Looking to the wording, mere constructive possession would not be sufficient as a person in absentia cannot be said to be intimidated, insulted or annoyed and such person had to be named by the prosecution in order to sustain in the charge of criminal trespass. **1983 P Cr. L J 42**.

442. House-trespass : Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

Explanation : The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

COMMENTS

This section defines "house-trespass". It is a criminal trespass committed by entering into (or remaining in) any building, tent or vessel used as human dwelling or any building as a place of worship or a place for the custody of property.

"Building" : The ordinary and usual meaning of building is an enclosure of brick or stone work covered by a roof. The mere surrounding of an open space of ground by a wall or fence of any kind cannot be deemed to convert the open space itself into a building, and trespass therein does not amount to house-trespass. A cattle enclosure, which was merely a piece of ground enclosed on one side by a wall and on the other three sides by a thorn-hedge, was held to be not a "building". But if the enclosure is for all practical purpose one of the rooms of the house and internal part of the building, it will be a "building" within the meaning of this section.

Section 442 does not contemplate the intended or the prospective use of the building. Only those buildings fall within the purview of this section which have been put to the uses specified in the section. Where a person after forcibly dispossessing a tenant enters the premises in this occupation and remains there against the will and without the consent of the landlord he would be guilty of house-trespass. **P L D 1959 Kar. 345**.

443. Lurking house-trespass : Whoever commits house-trespass having taken precautions to conceal such house-trespass from some person

who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass".

COMMENTS

This section defines 'lurking house trespass'. House-trespass, after taking precautions to conceal it, constitutes lurking house-trespass. The concealment should however be from such person who has the right to exclude or eject the trespasser.

Lurking house-trespass is punishable under Sections 453 to 455, as the case may be.

444. Lurking house-trespass by night : Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit 'lurking house-trespass by night'.

445. House-breaking : A person is said to commit "house-breaking" who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or, having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say:--

First : If he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass.

Secondly : If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly : If he enters or quits through any passage which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly : If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly : If he effects his entrance or departure by using criminal force of committing an assault, or by threatening any person with assault.

Sixthly : If he enters or quits any passage which he knows to have been fastened against such entrance or departure, and to have been fastened by himself or by an abettor of the house-trespass.

Explanation : Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations

(a) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house-breaking.

(b) A commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking.

(c) A commits house-trespass by entering Z's house through a window. This is house-breaking.

(d) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(e) A commits house-trespass by entering Z's house through the door having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(f) A finds the key of Z's house door, which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is house-breaking.

(g) Z is standing in his doorway. A forces a passage by knowing Z down, and commits house-trespass by entering the house. This is house-breaking.

(h) Z, the door-keeper of Y is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

COMMENTS

Gaining entry into a house with the intention of committing an offence by scaling wall amounts to house-breaking as the entry is by a passage not intended by any one, other than the offender for human entrance. Moreover, though it was not mentioned by any of the prosecution witnesses in so many words it is established by the circumstances that after throwing down S and R from the roof, the intruders quitted through the door in the courtyard of the house. That the door through which the intruders quitted had been fastened before the inmates of the house went to bed is clear from the fact that the intruders considered it necessary to scale the wall to gain entry into the house. The act of quitting by opening the door will make the sixth clause of Section 445, Pakistan P.C., applicable and make the intruders guilty of "house-breaking". The "house-breaking" having been committed after sunset and before sunrise amounted to house-breaking by night" within Section 446 of the Pakistan Penal Code. **P L D 1952 Lah. 609.**

446. House-breaking by night : Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night."

COMMENTS

A person who commits house-breaking between sunset and sunrise is said to commit the offence of house-breaking by night. This offence is equivalent of the crime known as burglary in English Law. Thus gaining entry into a house with the intention of committing an offence by standing a wall amounts to house-breaking. If this is done after sunset and before sunrise, it would amount to an offence under this section. **P L D 1952 Lah. 609.**

447. Punishment for criminal trespass : Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.

COMMENTS

Scope : A charge under Section 447 should specifically state the intent with which the entry is made, whether intent is to commit an offence or to intimidate, insult or annoy the person in possession of the property. The name of that person should also be stated. **1968 P Cr. L J 972; 20 D L R 48.**

The Magistrate must find what the intent with which the accused committed the trespass was. He is not to leave it to inference what the intent with which he committed the trespass was. **P L D 1967 Pesh. 62; P L D 1965 S C 640.**

Accused entering upon complainant's land with intent to dispossess him. Offence of criminal trespass is committed the very moment accused made entry. Entering upon land with intent to dispossess is sufficient cause of annoyance. **1971 S C M R 25.**

Petition dismissed for non-prosecution by High Court : None from the petitioner's side had entered appearance before the High Court in the petition for quashing of proceedings on even three previous dates. High Court, therefore, had no option but to dismiss the application for non-prosecution for which there was no legal bar. Leave to appeal was refused accordingly. **1997 S C M R 364.**

Intent was to commit an offence or intimidate, insult or annoy person in possession of property in dispute. It was *held that* condition was precedent to constitute offence of criminal trespass. Mere constructive possession was *held that* not sufficient to sustain charge of criminal trespass. **1983 P Cr. L J 42.**

Criminal trespass : Prosecution in order to establish the offence of criminal trespass must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim of right was a mere cloak to cover the real intent or at any rate constituted no more than a subsidiary intent. Entry upon land made under a *bona fide* claim, however, ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant. **1998 M L D 1838.**

448. Punishment for house-trespass : Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

COMMENTS

Taking of peaceful possession of immovable property without consent of the person in possession does not amount to criminal trespass. The fact that an accused should have known that the entry would cause annoyance to the man in possession is not enough to hold the act to be criminal trespass.

When a tenant vacates the premises physical possession automatically reverts to the landlord. The possession of the landlord continues even after the property has been let on rent and its actual possession delivered to the tenant for the possession of the tenant is the possession of the landlord. The possession of the landlord is, during the continuance of the tenancy, only subject to the actual possession of the tenant and the moment that physical possession disappears the full possession of the landlord is restored. It is a misconception that once the landlord lets some premises on rent, even though the tenant gives up possession of the premises, no offence in respect of the premises can be committed as against the landlord, and anybody is entitled to take possession of those premises without being in any way criminally liable. Where, therefore, a person after forcibly dispossessing a tenant enters the premises in his occupation or having already entered thereagainst the will and without the consent of the landlord he would be guilty of an offence under Section 448. **P L D 1959 Kar. 345.**

449. House-trespass in order to commit offence punishable with death : Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with imprisonment for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

COMMENTS

Scope : This section provides punishment for house-trespass committed with intent to commit an offence punishable with death.

450. House-trespass in order to commit offence punishable with imprisonment for life : Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

451. House-trespass in order to commit offence punishable with imprisonment : Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

COMMENTS

Scope : This section is similar to Sections 449 and 450. It provides punishment for house-trespass committed with intent to commit an offence punishable with imprisonment. In order to constitute an offence under this section the prosecution must first establish that an offence of simple house-trespass has been committed and then satisfy the Court in the particular case before it, that the house-trespass was committed with the object of committing a further offence punishable with imprisonment.

It is not necessary that the Court should be in a position to say which specific offence the accused intended to commit. It is sufficient if the evidence leaves no room for reasonable doubt that the accused intended to commit an offence.

Accused overpowering victim forcibly, taking her to a Kotha and despite resistance and committed sexual intercourse with her on her alarm the accused ran away. Sentence of two years in addition to fine of Rs. 500 was excessive and same was reduced to one year R.I. and a fine of Rs. 500 in circumstances. **1984 P Cr. L J 2207.**

Delay of eight days in making the report had been explained in the F.I.R. Statement of prosecutrix was corroborated by medical evidence and an independent eye-witness. Prosecutrix, an unmarried young lady, could not be believed to put her career, personal respect and family honour at stake by fabricating a false allegation of such nature in the absence of any motive. Prosecutrix, thus, had established its case against accused beyond any reasonable doubt. Convictions and sentences of accused were upheld accordingly. **1998 PCr.LJ 486.**

452. House-trespass after preparation for hurt, assault or wrongful restraint : Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Section 451 prescribes penalty for house-trespass committed with intent to commit an offence punishable with imprisonment. In this way it envelopes the provisions of this section. But the object of the Legislature in enacting this section is to provide severer punishment where house-trespass is committed in order to cause hurt to, or to assault, or to wrongfully restrain, any person.

Accused forming unlawful assembly and entering cafes, etc., forcibly to prevent people from eating and drinking Ramzan, the conviction under Section 452 was well founded. **P L D 1950 Pesh. 39.**

Where the appellant went to the complainant's shop with exclusive purpose of settling dispute over the use of passage between the complainant and the appellant but instead of coming to a compromise as a result of amicable negotiations parties clashed and a free fight entailing persons from both sides received injuries. In the circumstances of the case each participant was held responsible for his own individual act. **P L D 1984 S C 22.**

The strained relationship of the accused person with the deceased being motive of offence was proved by evidence on record. Telephonic message about firing promptly was communicated to the police station and Investigating Officer reaching the place of occurrence within minutes. The person lodging First Information Report was himself injured and witness of whole occurrence was indeed a competent person. No possibility of accused being substituted for real culprits or real culprits remained unknown. The witnesses varied and most natural ones that could be produced. The ocular evidence was provided by the natural witnesses who were of different categories. No possibility in recovery, of doing away with weapons of offence or with clothes, enlistment of independent recovery witness, therefore, was of no material difference to result. Fire-arm injuries on the deceased caused by pistol was recovered at the instance of the accused. No inference favourable to accused could possibly be drawn from nature of pellet injuries. The conviction of the accused was just and proper and there was no mitigating factor for interference in sentence in the circumstances. **1981 P Cr. L J 575.**

Quashing of Order : Magistrate without verifying whether challan was available in his Court or not had taken cognizance of the matter and summoned the accused while challan actually had not been submitted in the Court and Investigating Agency had only forwarded cancellation report of the case with which the Magistrate had not agreed. Impugned order of the Magistrate summoning the accused was without jurisdiction and lawful authority in circumstances and the same was set aside accordingly. **1998 PCr. LJ. 1538.**

453. Punishment for lurking house-trespass or house-breaking : Whoever commits lurking house-trespass or house-breaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

COMMENTS

This section provides penalty for the offence defined in Sections 443 and 444.

In all "house-breaking" there must be "house-trespass" and in all "house-trespasses" there must be "criminal trespass." Unless, the intent necessary to prove the offence of criminal trespass is present, the offence of house-breaking or house-trespass cannot be committed.

Where the accused at mid-night entered the house of the complainant by scaling the wall at the dead of night but the purpose for such trespass remained shrouded in mystery. In the circumstances of the case, the accused was held to be at least guilty of the offence of simple lurking house-trespass punishable under Section 453, P.P.C. **1981 PCr.LJ 248.**

454. Lurking house trespass or house-breaking in order to commit offence punishable with imprisonment : Whoever commits lurking house-trespass or house-breaking, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

COMMENTS

The offence described in this section is an aggrieved form of the offence defined in the last preceding section. The later portion of this section is designed to have included within its purview the cases of house-trespassers and house-breakers by night who have not only

intended to commit, but have actually committed theft. Mere entry on the property of another is not sufficient to make out a case of criminal trespass. What is necessary to prove is whether the intention of the accused was to cause annoyance, intimidation or insult. That such an annoyance, intimidation or insult may be the necessary consequence of such an act of entry is not enough. 1981 P Cr. L J 381.

455. Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint: Whoever commits lurking house-trespass, or house-breaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

456. Punishment for lurking house-trespass or house-breaking by night: Whoever commits lurking house-trespass by night or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

457. Lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment: Whoever commits lurking house-trespass by night, or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

COMMENTS

Quashing of F.I.R.: F.I.R. was got registered by the respondent against the accused petitioners with a delay of about two years and on the same set of allegations, except addition of some more persons, the story of theft had already been found false and the previous application of the complainant had been filed. Delay of more than two years itself was sufficient to hold the prosecution story as an afterthought. Impugned F.I.R. was got registered by the respondent as a counterblast to the F.I.R. got registered by the accused and was *mala fide*. F.I.R. was quashed in circumstances. 1996 P Cr. L J 263.

Leave to appeal refused: Appeal against acquittal of the charge under Section 457, P.P.C. Prosecution was unable to point out any legal infirmity in the conclusions arrived at by the Federal Shariat Court for acquitting the accused under Section 457, P.P.C. Leave to appeal was refused to the prosecution accordingly. 1998 S C M R 1221.

458. Lurking house-trespass or house-breaking by night after preparation for hurt, assault or wrongful restraint: Whoever commits lurking house-trespass by night or house-breaking by night, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

COMMENTS

Scope: This section is analogous to Sections 452 and 455. The application of this section would be justified only when the accused actually has himself made preparation for causing hurt to any person, etc., and not to his compensations as well as those who

themselves have not made such preparation. Where the accused was apprehended in the premises and thereafter was made to set in the street after apprehension, the High Court maintained the conviction but reduced sentence to one year already suffered. **N L R 1980 Criminal 312.**

Where the accused was indicted with the offence under this section by F.I.R. was registered after inordinate delay of 14 hours and reasons given therefor were not satisfactory and all the eye-witnesses, mashir and complainant were found to be related *inter se* had also their statements were found full of irreconcilable inconsistencies it was held that the prosecution could not fully establish the offence. The accused were given benefit of doubt and their conviction and sentences, in the circumstances were set aside. **1981 P Cr. L J 763.**

Forum of appeal : Accused had been tried under Section 17 of Offences Against Property (Enforcement of Hudood) Ordinance (VI of 1979) by the Sessions Court but were convicted only under Section 458, P.P.C. and sentenced to imprisonment exceeding two years. Appeal filed by accused in High Court was not competent under the law and lay before Federal Shariat Court. Appeal was consequently returned to the accused for presenting the same before the competent Court. **1996 P Cr. LJ 804.**

Sentence, reduction in : Accused had already suffered substantive part of his imprisonment and had further undergone the agony of protracted trial in the case which had lasted for more than seven years. Sentence of five years' R.I. awarded to accused was reduced to the period already undergone by him with remission of fine in circumstances. **1997 M L D 2509.**

Constitutional Petition : Registration of second F.I.R. F.I.R. already registered in the case was conspicuous by the absence of any mention whatever of the facts as alleged by the petitioner and the same, therefore, could not be investigated by the police. Information as to the commission of the cognizable offences having been brought to the notice of the S.H.O. he could not refuse to register the F.I.R. containing the petitioner's version of the case. S.H.O. was consequently directed to register the F.I.R. regarding the version of the petitioner. **P L D 1998 Lah. 111.**

Limitation Act : Sessions Court while acquitting co-accused in the connected appeal had made an observation about the non-credibility of the prosecution witnesses which had created grave doubt about the participation of accused in the commission of the offence and such important circumstances was sufficient for liberal construction of limitation in respect of the time-barred appeal of accused. Impugned order passed by Sessions Court rejecting the application of accused for condonation of delay and his appeal *in limine* was consequently set aside as the Court had not exercised its jurisdiction properly and the case was sent back for decision on merits. **1996 P Cr. L J 1824.**

[459. Hurt caused whilst committing lurking house-trespass or house-breaking : Whoever, whilst committing lurking house-trespass or house-breaking, causes hurt to any person or attempts to commit *qatl* of, or hurt to, any person, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to the same punishment for committing *qatl* or causing hurt or attempting to cause *Qatl* or hurt as is specified in Chapter XVI of this Code.

COMMENTS

Scope : This and the section following provide for a compound offence, the governing incident of which is that either a 'lurking house-trespass' or 'house-breaking' must have been completed in order to make a person who accompanies that offence either by causing

1 SCS 459 & 460 subs. by the Criminal Law (Amendment) Act, II of 1997.

grievous hurt or attempt to cause death or grievous hurt responsible under those sections. This section and Section 460 are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking. The accused one early morning were disturbed by a watchman while engaged in making a hole in the wall of the house of the complainant. Immediately upon being so disturbed they attempted to make good their escape, one of the accused firing off a pistol and the other two attempting to prevent their apprehension by using their sticks. The first accused was convicted under this section and the two others under Section 460.

Sentence of 10 years' R.I. and fine of Rs. 5,000 reduced to 5 years' R.I. and fine of Rs. 500 on ground that injuries suffered by complainant were simple in nature. **N L R 1995 AC 813 (a).**

Bail--Petition for : The picture which emerged was that the complainant party had suffered no loss at all. No injury was suffered by any person from the side of the complainant and no loss of property had occurred. *Held that:* The availability of identity card of applicant at the time of incident required further enquiry. Bail allowed. **1996 P L R 225 = 1997 PCr.LJ 646.**

Appreciation of evidence : Delay in lodging the F.I.R. stood explained in the F.I.R. itself. Incident having taken place inside the complainant's house eye-witnesses were natural witnesses of the occurrence whose evidence was corroborated by the injuries sustained by the complainant and no reason was available to disbelieve the same. Identification of the accused at the time of occurrence did not suffer from any wrong. Prosecution having failed to prove the injuries sustained by the complainant to be grievous, the same were to be treated as simple in nature. Conviction of accused was consequently maintained but in view of simple nature of the said injuries the sentence awarded to them was substantially reduced. **1997 PCr.LJ 135.**

460. Persons jointly concerned in lurking house-trespass or house-breaking by night punishable for qatl or hurt caused by one of them : If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty of such offence shall voluntarily cause or attempt to commit *qatl* of, or hurt to, any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to the same punishment for committing *qatl* or causing hurt or attempting to cause *qatl* or hurt as is specified in Chapter XVI of this Code].

COMMENTS

Scope : This section deals with the constructive liability of persons jointly concerned in committing lurking house-trespass or house-breaking by night in the course of which death or grievous hurt to any one is caused. It is immaterial who cause the death or grievous hurt. Every person jointly concerned in committing such house-trespass or house-breaking shall be punished in the manner provided in the section. This section can be invoked only if, from the evidence, it is clearly possible to conclude that before the commission of the lurking house-trespass by night, or house-breaking by night, the offenders did not have a common intention of committing anything other than the above-mentioned offences and that if during the course of the commission of such an offence one of the persons causes death or grievous hurt to any person, then only, every person jointly concerned in committing lurking house-trespass by night or house-breaking by night shall be guilty of an offence under this section. **P L R 1964 Dacca 105.**

The offence of murder having been committed after the offence of house-breaking terminated will not attract the provisions of Section 460, P.P.C. The robbers, finding that the

residents of the village intended to capture them, scaled the wall of the house in which they had committed robbery and jumped outside into the lane, carrying with them some clothes belonging to the owner of the house. When outside the house the robbers were surrounded by the villagers, to large numbers, at which one of the robbers who carried a fire-arm fired at the villagers, four of whom received injuries and one of those four died. It was *held that* Section 460, P.P.C., was inapplicable. **P L D 1956 Lah. 157.**

Administration of criminal justice : Where two views or inferences were possible, one favourable to the accused should be preferred. **1994 P Cr.LJ 2060.**

Extra-judicial confession--Evidentiary value : Extra-judicial confession can be a corroborative piece of evidence and cannot initially form the basis of conviction. **1997 M L D 1550 (b).**

Identification parade : Mere identification of an accused in an identification parade without any reference to the role played by him in the occurrence carries no weight. **1994 P Cr.L J 2060.**

461. Dishonestly breaking open receptacle containing property : Whoever dishonestly or with intent to commit mischief breaks open or unfastens and closed receptacle which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

This section and the following section provide for the same offence. As soon as the receptacle is broken open or unfastened the offence is complete.

'Receptacle' : This may include not only a room, a part of a room or closed, etc., but a box or closed package. T, being an inmate of his uncle's house, broke open a chest and took out property from it. He was convicted of an offence under Section 457. It was *held that* he could not properly be convicted under that section but should have been convicted under this section and Section 378.

462. Punishment for same offence when committed by person entrusted with custody : Whoever, being entrusted with any closed receptacle which contains or which he believes to contain property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

This section deals with the same offence as is punishable under the preceding section. The punishment under it is higher as there is a breach of trust on the part of the person to whom the receptacle is entrusted.

CHAPTER XVIII

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS

This Chapter contains Sections relating to forgery, making false documents, etc., and punishments therefor.

Section 477-A deals with falsification of accounts, Sections 463 and 464 explain 'forger'. Sections 479 to 489 deal with property marks, etc., and Sections 489-A to 489-E deal with counterfeiting, passing or possessing currency-notes and bank-notes.

463. Forgery : Whoever makes any false document or part of a document, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

COMMENTS

This section defines forgery. Forgery may be defined as making a false document with any of the intents mentioned in the section.

Ingredients of the section : (1) Making a false document or part of a document.

(2) With an intent--

- (a) to cause damage or injury to the public or to any person, or
- (b) to support any claim or title, or
- (c) to cause any person to part with property, or
- (d) to enter into any express or implied contract, or
- (e) to commit fraud (or that fraud may be committed).

Constitutional petition : Registration of criminal case while matter was *sub judice* in a Civil Court. Petitioner moved High Court praying that Police be directed not to register a criminal case in pursuance of order of Sub-Registrar while the matter was pending decision in a Civil Court. *Held*, as long as, it was not established that the transaction entered into by petitioner was fake and fabricated one, no case could be registered with the Police till the pendency of civil suit. Only the Civil Court exercising powers under Section 476, Cr.P.C. could direct the Police to register case, if the Civil Court came to the conclusion that the petitioner fabricated the document (sale-deed). **1998 M L D 686.**

464. Making a false document : A person is said to make a false document--

First : Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or

Secondly : Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly : Who dishonestly or fraudulently causes any person to sign, seal, execute or later a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration.

Illustrations

(a) A has a letter of credit upon B for rupees 10,000, written by Z. A, in order to defraud E, adds a cipher to the 10,000 and makes the sum 10,0000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(b) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B and thereby of obtaining from B the purchase-money. A has committed forgery.

(c) A picks up a cheque on a banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand rupees. A commits forgery.

(d) A leaves with B, his agent, a cheque on a banker, signed by A, without inserting the sum payable and authorises B to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. B commits forgery.

(e) A draws a bill of exchange on himself in the name of B without B's authority, intending to discount it as a genuine bill with a banker and intending to take up the bill on its maturity. Here, as A draws the bill with intent to deceive the banker by leading him to suppose that he had the security of B, and thereby to discount the bill, A is guilty of forgery.

(f) Z's will contains these words : "I direct that all my remaining property be equally divided between A, B and C." A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C, A has committed forgery.

(g) A endorses a Government promissory-note and makes it payable to Z or his order by writing on the bill the words "Pay to Z or his order" and signing the endorsement. B dishonestly erases the words "Pay to Z or his order" and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(h) A sells and conveys an estate to Z, A afterwards, in order to defraud Z of his estate executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z, A has committed forgery.

(i) Z dictate his will to A. A intentionally writes down a different legatee from the legatee named by Z, and by representing to Z, that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(j) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made false document in order to induce Z to part with property, A has committed forgery.

(k) A without B's authority writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an express or implied contract for service.

Explanation 1 : A man's signature of his own name may amount to forgery.

Illustrations

(a) A signs his own name to a bill of exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(b) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a bill of exchange drawn by B upon Z, and negotiate the bill as though it had been accepted by Z. A is guilty of forgery; and if B, knowing the fact, draws the bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(c) A picks up a bill of exchange payable to the order of a different person of the same name A endorses the bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable, here A has committed forgery.

(d) A purchases an estate sold under execution of a decree against B, B after the seizure of the estate, in collusion with Z, executes a lease of the estate to Z at a nominal rent and for a long period and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(e) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors; and in order to give a colour to the transaction, writes a promissory-note binding himself to pay to B a sum for value received, and antedates that note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2 : The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration

A draws a bill of exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

465. Punishment for forgery : Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

The offence of forgery is defined in Sections 463 and 464 of the Code. Under Section 463 the making of a false document with any of the intents therein mentioned is forgery and Section 464 sets forth when a person is said to make a "false document" within the meaning of the Code.

The definition of forgery in the Code is not as simple and clear as it is in common law. Forgery in England is not defined by statute. It is defined in common law as the fraudulent making or alteration of a writing to the prejudice of another man's right.

Ingredients : The elements of forger are--

1. The making of a false document or part of it.
2. Such making should be with intent to --
 - (a) cause damage or injury to (i) the public, or (ii) any person, or
 - (b) support any claim or title; or
 - (c) cause any person to part with property; or
 - (d) enter into any express or implied contract; or
 - (e) commit fraud or that fraud may be committed.

"Making a false document" : A close analysis of the provision of Section 463 would show that the two essential ingredients of the offence of forgery are, *firstly*, the making of a false document and *secondly*, doing it with a fraudulent intention to cause damage or injury to any person, to support a false claim or to cause a person to part with property, etc. The expression "making a false document" has been further elaborated in Section 464, P.P.C. In order to be a false document it must satisfy one of two alternative conditions, *i.e.*, it must have been made: (1) with the intention of causing it to be believed that such document or part of document was made, signed, sealed or executed by or by the authority of a person by whom or by whose authority the accused knows that it was not so made, signed, sealed or executed. (2) Alternatively, that if the authority of the executant is not disputed, the intention, to cause it to be believed that it was made at a time at which the accused knows that it was not made, signed or executed. **1971 P Cr. L J 799.**

Accused an Assistant Licence Clerk, in Police Office, was guilty of forging driving licences but nobody ever saw him forging alleged forged licence. The Trial Court come to conclusion that opinion tendered by official expert of questioned documents was more sound and reliable as against opinion given by Private Expert but gave no reasons in coming to such conclusion. Prosecution, had failed to prove its case against the accused beyond doubt. The conviction and sentence were set *aside*, in circumstances. **1983 P Cr. L J 697.**

Registration of case : S.H.O. was not within his statutory right to refuse the registration of the case when the commission of the offence was alleged by the complainant to lay such information in writing through application before the Senior Police Officers soon after coming to know about the commission of forgery by the accused in the matter of the receipt of Rs. 5,00,000 from him. Neither Deputy Superintendent of Police (Legal) was possessed of any authority/jurisdiction to opine on the method/manner of registration of a criminal case by the S.H.O. nor even his opinion was supported by any precedent. Failure on the part of S.H.O. to register the case was, therefore, declared to be beyond his statutory duty and he was directed to proceed with the registration of the case and to conduct investigation of the same under Police Rules, 1934. **1994 P Cr. L J 798.**

Revision against dismissal of complaint : Trial Court had not ignored altogether the value of the evidence adduced and had recorded valid reasons for dismissal of the complaint to which no exception could be taken on the ground that the Trial Court had not recorded an elaborate and comprehensive order. Parties having sought the enforcement of their rights and interests under the sale contract, dispute between them, was essentially of civil nature for which proper forum was Civil Court. Complaint was belated by more than a year without any plausible explanation. Since complainant had failed to make out a *prima facie* case against the accused, question of staying the proceedings in the criminal case could not arise. Trial Court when dismissing the complaint had neither acted illegally nor with material irregularity. Revision petition was dismissed accordingly. **1996 M L D 111.**

466. Forgery or record of Court or of public register, etc. : Whoever forges a document, purporting to be a record or proceeding of or in a Court of Justice, or a register of birth, baptism, marriage or burial or a register kept by a public servant as such, or a certificate or document purporting to be made by public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein or to confess judgment, or a power-of-attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Scope : This section "is not intended to apply to cases to where a public officer, or a person acting for a public officer, whose duty it is to make entries in a public book, knowingly makes a false entry, but to cases where a certificate or other document is forged by some unauthorized person with a view to make it appear that it was duly issued by the public officer

as, for instance, where a man forges a marriage certificate duly issued by the officer who ought to have issued it." But the former Chief Court of the Punjab held that whoever, whether a public servant or a private individual, so tampers with a public register, as to commit forgery, is punishable under this section. Intent to defraud is, however, essential.

Issue of copies : Where a person who is bound to give a true copy of any document gives a true copy of such document, he cannot be convicted of forgery punishable under this section, merely because the original of which he gives a true copy contains a statement which is false, and is known or believed by him to be such. As the original was not forged by the person giving the copy, he could not be convicted of forgery.

Fraudulent intent--existence of : A person who, at the request of another, sent to trap him, fabricates a document purporting to be a notice under the seal and signature of a Deputy Collector, he being informed that the notice was required by such other person for the purpose of being used in a pending suit (there being, however, in reality no such suit in existence) is guilty of forgery, it not being necessary that the intention of fraudulently using the document should exist in the mind of any person other than the person fabricating the document.

467. Forgery of valuable security, will, etc. : Whoever forges a document which purports to be a valuable security, or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Scope : The offence described in this section is an aggravated form of the offence dealt with in Section 466. The section provides punishment for forgery not only of a document purporting to be a valuable security but also of any document which purports to give authority to any person "to receive or deliver any money." **A I R 1933 Pesh. 488.**

Valuable security : General power-of-attorney creating a legal right in the property with the power of its disposal is a valuable security. **1994 M L D 1378.**

Bail. Petition : F.I.R. recorded in 1992. Investigation Agency not finalising investigations till 1994. Final challan was not submitted till 12-7-1997. *Held that :* The case of the petitioner became one of further inquiry thereby attracting the provisions of sub-section (2) of Section 497, Cr.P.C. Petitioner allowed bail. **K L R 1997 Cr. C. 666.**

Quashing of F.I.R. : Patwari of his own had submitted a report to the Circle Girdawar for the review of the sale mutation and no application had been filed by the accused before any Revenue Authority in the matter. Fact of the names of the accused having not been correctly mentioned in the sale-deed was not by itself sufficient for their prosecution and on the basis of mere conjectures and surmises they could not be held to have forged the documents and paid bribe to the Revenue Staff. F.I.R. against the accused was quashed in circumstances. **1997 M L D 1187.**

Appeal against acquittal : Trial Court was of the opinion that by making a sale, offence of cheating was not made out and that the Municipal Corporation had to seek its remedy of demolition under Section 274 of the City of Lahore Corporation Act, 1941 if any building had been erected on the area. Trial Court had held that on the basis of facts no offence of cheating or forgery was made out and there was no probability of the accused being convicted of any offence. Other conditions of Section 249-A, Cr.P.C. had also been satisfied by the Trial Court.

before recording the order of acquittal of accused thereunder. Appeal was dismissed accordingly. **1998 S C M R 1840.**

468. Forgery for purpose of cheating : Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Forgery for purpose of cheating : Forgery although by itself is a substantive offence, yet it includes an element of attempt also. Normally it is done for a criminal act which follows forgery. **P L D 1997 Kar. 311 (d).**

Forgery, though a substantive offence, partakes of the nature of an attempt. It is usually an act done in furtherance of some other criminal design. If it can be proved that the purpose of the offender in committing the forgery is to obtain property dishonestly, or, if his guilty purpose comes within the definition of cheating, he is punishable under the present section. The intention of the forger may be fairly inferred in most cases from the contents of the forged documents.

If the cheating is complete and the subsequent forgery is for the purpose of concealing that offence, this section does not apply.

To establish fraudulent intention under this section it is not essential to prove pecuniary advantage.

Accused cannot be convicted of charge under Section 468 when on same evidence which is made basis of conviction, three co-accused were acquitted. **1996 AC 275 (a) = 1997 PCr.LJ 639.**

Compromise between complainant and convicts, would be a ground for reduction of sentences of convicts as already undergone. **N L R 1994 Cr. L J 580.**

Courts below had accepted the prosecution evidence against the accused for valid reasons and had already taken a lenient view in the matter of sentence. Leave to appeal was refused in circumstances. **1995 S C M R 1096.**

The Trial Court acquitted accused of charge of forgery with regard to one licence but found him guilty for copy of other licence. Principle on basis of which trial Judge disbelieved the evidence of prosecution in one case was not applied in the other case. The trial Judge even after summoning the Court witnesses to fill in lacuna was unable to connect the accused with commission of offence. Number appearing on licence did not tally with the registers and signatures allegedly forged on licences were not sent to the handwriting expert for comparison and report. The conviction and the sentence were *set aside*. **P L D 1984 Pesh. 146.**

The evidence on record clearly made the accused guilty of fraud and misappropriation. Finding based on such evidence by Special Judge was correct. The conviction was maintained. **1984 P Cr. L J 2060.**

Accused had prepared the false pass book and attested the false photograph affixed on the same which was supported by the report of the Handwriting Expert. Accused had also admitted his handwriting and attestation of the photograph on the said pass book in his statement under Section 342, Cr.P.C. Trial Court had already treated the accused leniently in the matter of sentence due to his advanced age and retirement from service. Conviction and sentence of accused were upheld in circumstances. **1996 PCr.LJ 1328.**

Appeal against--Conviction : Sessions Court had accepted the appeal of accused against their conviction by the Magistrate and their acquittal had been maintained by High Court in revision. Sufficient evidence was available on the record on the basis of which conviction of accused was recorded by Trial Court. High Court had neither discussed the

evidence nor had passed the speaking order. Leave to appeal was granted accordingly. 1995 S C M R 486.

Appointment of Special Judge Illegal--Effect : Appointment of Special Judge, Anti-Corruption being illegal, all the proceedings conducted by him in the case were without jurisdiction. Convictions and sentences awarded to accused by the Special Judge were consequently set aside. Accused had got himself appointed as a Laboratory Assistant on the basis of a forged/bogus Matriculation Certificate. If a retrial was not ordered for getting a judicial verdict whether or not the accused obtained appointment on the basis of a forged certificate, he would continue in service even if he really committed forgery etc. which would amount to perpetuating a wrong on legal technicalities and the same could not be permitted as an act of the Court should not prejudice any party. Accused, therefore, must face the trial and the prosecution must be given an opportunity to prove its case against him. Case was remanded accordingly to the Trial Court for fresh trial according to law from the stage from where the aforesaid Special Judge had conducted the proceedings. 1998 PCr. LJ 137.

469. Forgery for purpose of harming reputation : Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENTS

The making of a false document for the purpose of injuring the reputation of any person is punishable under this section. For instance if A, with the intention of harming B's reputation or knowing that what he does is likely to have this effect, writes a letter in limitation of B's handwriting purporting to be addressed to a confederate in some disgraceful or dishonest transaction and shows this letter to other persons, he commits this offence.

470. Forged document : A false document made wholly or in part by forgery is designated "a forged document".

471. Using as genuine a forged document : Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

COMMENTS

Scope : This section lays down that the sentence that can be imposed for the offence of using a forged document as genuine is the same as the sentence that can be imposed for the offence of forgery.

This section is directed against some person other than a person proved to be the actual forger. A forger cannot be punished both for forging a document (S. 465) and for using it as genuine. (S. 471). A person who both forged a document and used it as genuine can be sentenced for both the offences. But also *held that* an abettor of the forgery of a document cannot be convicted of the offence of using it as genuine.

Ingredients : Under this section there must be :

1. Fraudulent or dishonest use of a document as genuine.
2. Knowledge or reasonable belief on the part of the person using the document that it is a forged one.

The use of a forged document which is contemplated by this section is such use as causes wrongful gain or wrongful loss. That is to say, the section applies to the case of a person who appears before some other person, or before a Court with a document and

endeavours to induce that person or Court to do some act which he or it would not do if it was known to be a forgery. The offence is complete once the document is produced or given in evidence. Where in a judicial inquiry under Section 202, Criminal Procedure Code, against a person accused of having forged a document, the accused stated before the inquiring Magistrate that the document was genuine, it was *held* that he could not be said to have used the document so as to make himself amenable to the provisions of this section even though he knew the document to be a forged one.

Where the petitioner was alleged to have committed some administrative/financial irregularities, it was held to be natural to free him in order to consult the record and explain his position, as such interim bail was confirmed in absence of compelling reasons. **1981 P Cr. L J 295.**

The petitioner challenged the order of the Assistant Commissioner directing registration of case against him on allegation of allotment of land obtained by fraud or record forged or abetted in commission of crime. In view of nature of allegations, disputed facts, absence of original or authentic record interference in impugned order, was not possible. The petitions were dismissed. **1983 P Cr. L J 821.**

Conviction challenged with contention that photostat copies were neither admissible in evidence nor these photostat copies fall within definition of "false document" within meaning of Section 471. High Court finding that convict in his examination under Section 342, Cr.P.C. had candidly admitted to have produced photostat copies for obtaining employment and that he had knowledge that document was not genuine. *Held* : Conviction was unassailable in view of the fact that false and fabricated documents were used to get employment and same did not appear to suffer from legal infirmity so as to call interference by High Court. **1997 P L R 877 = 1997 Law Notes (Lah.) 1048.**

Material witnesses who could prove the forgery of documents in question by the accused had not been produced by the prosecution. Handwriting and the signatures of the accused were not even sent for comparison to the Handwriting Expert to prove that the disputed signatures had been forged by him. No charge under Section 468, P.P.C. was framed or proved against the accused to infer that he had used the forged documents as genuine knowing the same to be forged ones. Solitary statement of the complainant was of no worth and could not be relied upon as he himself had also relied upon the same documents which had not been proved to have been forged by the accused. Case against accused was of no evidence in circumstances and he was acquitted on benefit of doubt accordingly. **1994 M L D 1697.**

False document--Production of--Sentence : Accused submitting bill regarding Leave Travel Concession without actually undertaking travelling. Offence alleged to have been committed 10 years before. Accused was in jail and already undergone three months' R.I. Sentence reduced to period already undergone. **1994 P S C (CrI.) 783.**

472. Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under Section 467 : Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under Section 467 of this Code, or with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punishable with imprisonment for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

This section punishes for--

- (1) making or counterfeiting any seal, plate or other instrument for making an impression with the intention of using the same for forging valuable securities, will, etc. (as specified under Section 467);
- (2) possessing such seal, plate, instrument, etc., knowing the same to be counterfeit.

Procedure : Not cognizable -- Warrant -- Bailable -- Not compoundable--Triable by Court of Sessions.

473. Making or possessing counterfeit seal, etc., with intent to commit forgery punishable otherwise : Whoever makes or counterfeits any seal, plate or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than Section 467, or, with such intent, has in his possession any such seal, plate or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

474. Having possession of document described in Section 466 or 467 knowing it to be forged and intending to use it as genuine : Whoever has in his possession any document, knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document is one of the description mentioned in Section 466 of this Code, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the document is one of the description mentioned in Section 467, shall be punished with imprisonment for life, or with imprisonment of either description, for a term which may extend to seven years, and shall also be liable to fine.

475. Counterfeiting device or mark used for authenticating documents described in Section 467, or possessing counterfeit marked material : Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document described in Section 467 of this Code, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeit, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

The commencement of the forgery of bank-notes and other similar securities where it has proceeded to the length which is described in this section, is treated as a substantive offence and punished. Also the possession of the prepared material, etc., is punished.

This section supplements the provisions of Section 472.

This document must be of a nature mentioned in Section 467.

476. Counterfeiting device or mark used for authenticating documents other than those described in Section 467, or possessing counterfeit marked material : Whoever counterfeits upon, or in the substance of, any material, any device or mark used for the purpose of authenticating any document other than the documents described in Section 467 of this Code, intending that device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who, with such intent, has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

477. Fraudulent cancellation, destruction, etc., of will, authority to adopt, or valuable security : Whoever fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys or defaces or attempts to cancel, destroy or deface or secretes or attempts to secrete any document which is or purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect to such document, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

COMMENTS

Scope : This section applies when the document tampered with or destroyed is either a will, or an authority to adopt, or a valuable security. Owing to the great importance of documents of this kind the punishment provided is severe. The document must be a genuine one. The offence under this section cannot be committed in respect of a document which is forged.

[477-A. Falsification of accounts : Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular form or in, any such book, paper, writing valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation : It shall be sufficient in any charge under this section to allege a general intention to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed].

1 Section 477-A ins. by the Criminal Law (Amendment) Act, III of 1895.

COMMENTS

Scope : The marginal note to this section indicates that the section only applies where there is falsification of accounts. The Explanation to the section imports the same idea, namely, that the section refers to something in the way of book-keeping or written accounts.

This section only requires the falsification of accounts with intent to defraud. It does not require any deprivation of property. Where officers of a co-operative stores made false entries in the accounts they were held guilty under this section even though no one lost eventually by such false entries.

Ingredients : The section requires the following essentials :--

1. The person coming within its purview must be a clerk, officer, or servant, or acting in the capacity of a clerk, officer or servant.

2. He must wilfully and with intent to defraud--

- (i) destroy, alter, mutilate or falsify any book, paper, writing, valuable security or account which--
 - (a) belongs to, or is in possession of, his employer, or
 - (b) has been received by him for or on behalf of his employer; or
- (ii) make or abet the making of any false entry in, or omit or alter or abet the omission or alteration of any material particular form or in, any such book, paper, writing, valuable security or account.

Of Trade, Property and Other Marks

[478. Trade mark : A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark, and for the purposes of this Code the expression "trade mark" includes any trade mark which is registered in the register of trade marks kept under the Trade Marks Act, 1940 (V of 1940)].

479. Property mark : A mark used for denoting that movable property belongs to a particular person is called a property mark.

480. Using a false trade mark : Whoever marks any goods or any case, packages or other receptacle containing goods, or uses any case, package or other receptacle with any mark thereon, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade mark.

481. Using a false property mark : Whoever marks any movable property or goods or any case, package or other receptacle containing movable property or goods, or uses any case, package or other receptacle having any mark thereon, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

1. Sec. 478 subs. by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.

COMMENTS

This section defines the offence of using a false property-mark.

A property-mark is intended to denote ownership over all movable property belonging to a person whether it is all of one kind or of different kinds. So long as the person owns movable properties his property-marks impressed upon them remain his, though any particular article out of it may after such impression pass out of his hands and cease to be his.

The function of a property-mark to denote certain ownership is not destroyed because any particular property on which it was impressed has ceased to be of that ownership.

Ingredients : This section requires two essentials :

1. Marking any movable property or goods of any case, package or receptacle containing goods; or using any case, package or receptacle, with any mark thereon.
2. Such marking or using must be in a manner reasonably calculated to cause to be believed that the property or goods so marked on the property or goods contained in such receptacle belonged to a person to whom they did not belong.

482. Punishment for using a false trade-mark or property mark : Whoever uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

483. Counterfeiting a trade mark or property mark used by another : Whoever counterfeits any trade mark or property mark used by any other person shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

484. Counterfeiting a mark used by a public servant : Whoever counterfeits any property mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the property is of a particular quality or has passed through a particular office, or that it is entitled to any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

COMMENTS

The offence under this section is an aggravated form of the offence described in the preceding one. An enhanced punishment is, therefore, given where a mark used by a public servant is counterfeited.

485. Making or possession of any instrument for counterfeiting a trade mark or property mark : Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

The first part of this section is concerned with making or possessing any instrument for the purpose of counterfeiting a mark whereas, the second part is concerned with possession of a mark for the purpose of passing off.

486. Selling goods marked with a counterfeit trade mark or property mark : Whoever sells, or exposes, or has in possession for sale or any purpose of trade or manufacture, any goods or thing with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves--

- (a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and
 - (b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or
 - (c) that otherwise he had acted innocently,
- be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

COMMENTS

Scope : This section saves from punishment persons dealing with goods bearing false marks if they are able to prove that after taking reasonable precautions they had no ground to suspect the genuineness of the mark, and that they gave all the information in their power as to the source from which the goods were obtained or that otherwise they had acted innocently in the matter.

487. Making a false mark upon any receptacle containing goods : Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain or that it does not contain goods which it does contain, or that the goods contained in such receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

COMMENTS

This fraudulent marking of false marks of any description of goods for the purpose of deceiving public servant such as customs officers, is punishable under this section. Thus importation of contraband goods under false marks will come under the purview of this section. The section is more comprehensive than Sections 482 and 486.

488. Punishment for making use of any such false mark : Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.

489. Tampering with property mark with intent to cause injury : Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine or with both.

Of Currency-Notes and Bank-Notes

¹[489-A. Counterfeiting currency-notes or bank-notes : Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation : For the purposes of this section and of Sections 489-B, 489-C and 489-D, that expression "bank-note" means a promissory-note or engagement for the payment of money to bearer on demand issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to, or as a substitute for money.

489-B. Using as genuine, forged or counterfeit currency-notes or bank-notes : Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

Accused had not consciously kept the currency-note with him knowing the same to be a fake one. Neither the ocular evidence was worth reliance nor any circumstantial evidence had linked the accused with the crime. No evidence was produced to show as to in whose custody the alleged currency-note remained from the date of its recovery to the date of its despatch to the State Bank for its verification and it could not positively be said to be the same note which was recovered from the accused. Said currency-note had not even been shown to the prosecution witnesses for identification at the time of trial. Accused was given the benefit of doubt and acquitted in circumstances. **1995 P Cr. L J 662.**

Prosecution had failed to prove on record how the fake currency note which had already been impounded in another case had been removed from the case-property of that case. Prosecution evidence was contradictory on material points regarding drafting of F.I.R., arrest of accused and recovery of the said currency note from him. Complainant's version was also contradictory to the evidence on record. Accused was acquitted in circumstances. **1995 P Cr. L J 1715.**

Accused had not denied the recovery of counterfeit currency amounting to Rs. 19,300 from him, but simply claimed the same to have been planted on him by co-accused and the police. No evidence was brought on record to show any enmity or motive on the part of co-accused or police for false implication of accused. Recovery of counterfeit currency from the accused was even proved on record by convincing and reliable evidence. Conviction and sentence of accused under S. 489-C, P.P.C. were consequently upheld. However, there being

1. Section 489-A to 489-D ins. by the Currency-Notes Foreign Act, XII of 1899, S. 2.

no evidence that accused had either used the forged currency or he was involved in trafficking or selling the same, he was acquitted of the charge under S. 489-B, P.P.C. **1998 PCr. LJ 230.**

Recovery of articles not packed and sealed at the place of recovery but at police station cannot be relied upon being doubtful. **1995 P.Cr.LJ 1715.**

Using and possession of counterfeit currency-note--Offence of--Conviction for--Appeal against : Whisking away from spot is a clear indication that appellant was in knowledge that he was using counterfeit currency-notes. At the time of his arrest, he was found to be in possession of Rs. 376 genuine currency-notes. He has purchased only 200 grams of red peppers for which he presented a forged currency-note of Rs. 100 while he was in possession of currency-notes of smaller denomination which he had intentionally not used. These facts clearly prove that appellant was fully aware of fakeness of currency-note which he was using for purchase of red peppers. As regards F accused/appellant, he has not brought anything on record to show his enmity with police or M. appellant. Statements of complainant and P.Ws. are quite convincing to prove that counterfeit currency-notes were recovered from person of F appellant and he had not denied recovery of said notes. There appears no force in his contentions that counterfeit currency of Rs. 19,300 in Rs. 100 denomination was planted upon him by co-accused or police. Anyhow there is a quite force in his contention that he could not be convicted under Section 489(b), P.P.C. as he had not used forged currency-notes nor there is any evidence that he was involved in trafficking or selling counterfeit currency. In this connection, there is no other evidence in support of such allegation except appellant Malik Sabir Hussain, co-accused. Hence in case of F appellant, provision of Section 489-B, P.P.C. could not be invoked, his conviction under Section 489-B, P.P.C. *set aside* but conviction under Section 489-C maintained. Quantum of sentence in case of M reduced to 7 years from life imprisonment as he was not a previous convict and had fully co-operated with police in apprehension of person from whom he had allegedly received a fake currency-note. **P L J 1997 Cr.C. (Lah.) 1482; 1998 P Cr. L J 230.**

489-C. Possession of forged or counterfeit currency-notes or bank-notes : Whoever has in his possession any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENTS

Appeal against acquittal : Allegation against the accused in the F.I.R. and the prosecution evidence was that they were found in possession of forged currency-notes. Such allegation, *per se*, was not sufficient to sustain conviction under Section 489-C, P.P.C. Prosecution was bound to establish that the accused had kept the forged currency-notes in their possession knowing or having reasons to believe the same to be forged or counterfeit and intended to use them as genuine, or the same might be used as genuine and in the absence of any such proof the essential ingredients of the offence had not been proved. Trial Court's order acquitting the accused, therefore, did not suffer from any illegality. Appeal against acquittal of accused was dismissed *in limine* accordingly. **1996 M L D 2049.**

489-D. Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes : Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has to his possession, any machinery, instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency-note or bank-note, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.]

¹[489-E. Making or using documents resembling currency-notes or bank-notes : (1) Whoever makes, or causes to be made, or uses for any purposes whatsoever, or delivers to any person, any document purporting to be, or in any way resembling or so nearly resembling, as to be calculated to device, any currency-note or bank-note shall be punished with ²[imprisonment of either description for a term which may extend to one year, or with fine or with both.]

(2) If any person, whose name appears on a document the making of which is an offence under sub-section (1), refuses, without lawful excuse, to disclose to a police-officer on being so required the name and address of the person by whom it was printed or otherwise made, he shall be punished with ²[imprisonment of either description for a term which may extend to one year, or with fine, or with both.]

(3) Where the name of any person appears on any document in respect of which any person is charged with an offence under sub-section (1) or on any other document used or distributed in connection with that document it may, until the contrary is proved, be presumed that person caused the document to be made.]

¹[489-F. Counterfeiting of using documents resembling National Prize Bonds or un-authorised sale thereof : Whoever counterfeits, or causes to counterfeit, or perform any act to use for any purpose whatsoever, or delivers to any person, any document purporting to be, or in any manner resembling to the National Prize Bonds, or indulges in the business of sale or purchase of National Prize Bonds, or promotes such sale or purchase of National Prize Bonds, in contravention of the rules made for the purpose, shall be punishable with imprisonment for a term which may extend to five years, or with fine not exceeding one hundred thousand rupees, or with both.]

1. Sec. 489-E ins. by the Penal Code (Amendment) Act, VI of 1943, S. 2.

2. Subs. for "fine which may extend to one hundred rupees" by the Criminal Law (Amdt.) Act, VIII of 1976, Sec. 2.

1. S. 489-F ins. by Ordinance, LXXII of 95.

CHAPTER XIX

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE

490. Breach of contract of service during voyage or journey : [Rep. by the Workmen's Breach of Contract (Repealed Act, III of 1925), S. 2 and Schedule].

491. Breach of contract to attend on any supply wants of helpless person : Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both.

COMMENTS

Object : The authors of the Code say: "We....think that persons who contract to take care of the sick and of the helpless lay themselves under an obligation of a very peculiar kind, and may with propriety be punished if they omit to discharge their duty. The misery and distress which their neglect may cause is such as the largest pecuniary payment would not repair; they generally come from the lower ranks of life, and would be unable to pay anything. We, therefore, propose to add to this class of contracts the sanction of the penal law."

Ingredients : This section requires three essentials :--

1. Binding of a person by lawful contract.
2. Such contract must be to attend on or to supply the wants of a person who is helpless or incapable of providing for his own safety or of supplying his own wants by reason of (i) youth, or (ii) unsoundness of mind, or (iii) disease, or (iv) bodily weakness.
3. Voluntary omission to perform the contract by the person bound by it.

492. Breach of contract to serve at distant place to which servant is conveyed at master's expense : [Rep. by the Workman's Breach of Contract (Repealing) Act, III of 1925, Sec. 2 and Schedule].

OF OFFENCES RELATING TO MARRIAGE

493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage : [Rep. by the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979, S. 19].

494. Marrying again during lifetime of husband or wife : Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception : This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

COMMENTS

Scope : This section punishes bigamy. For this offence there must be at the time of second ceremony of marriage a previously subsisting valid marriage.

Conditions of a valid marriage : A valid marriage has to satisfy the following conditions:

- (1) That it does not infringe any prohibition under the law of domicile by which the parties are governed.
- (2) That the ceremonies of a marriage were duly performed in the forms required by the law of the place where the marriage was solemnised.

It, however, the parties are of different domicile or religion or the marriage celebrated in a foreign country, the validity is to be determined according to the recognised principles of International Law.

Object : The object of enacting this section is to punish persons who in defiance of the law applicable to them in matters of marriage and divorce, etc., take a second wife during the existence of the first. Such persons are not allowed to repudiate the second marriage by alleging some defect in it. They cannot escape liability under the section by showing that the second marriage was invalid. **P L D 1963 Lah. 141.**

Charge of abetment/conspiracy cannot stand against co-accused when principal accused husband cannot be prosecuted under Section 494/495 on ground that as Muslim male he could have plurality of wives. **1997 Cr. L J 281.**

Charge under S. 494/495 cannot be framed against a Muslim male who can have plurality of wives and can also have as many as four wives at same time. **1997 Cr. L J 281.**

Ingredients : This section requires :

1. Existence of the first wife or husband when the second marriage is celebrated.
2. The second marriage being void by reason of the subsistence of the first according to the law applicable to the person violating the provisions of the section.

'Having a husband or wife living' : If the first marriage is not a valid marriage no offence will be committed by contracting a second marriage. For instance, if A marries B, a person within prohibited degrees of affinity, and during B's lifetime marries C, A has not committed bigamy. **P L R 1959 Dacca 945.**

On conversion to Islam : A Christian converted to Islam is not prohibited from taking a second wife and in such a case the validity of the second marriage will be judged according to Muhammadan Law alone. **P L D 1967 S C 334.**

Complainant's husband being a Muslim male could have as many as four wives at the same time and he could not be charged and prosecuted under Sections 494 and 495, P.P.C. nor his second marriage with the complainant during the lifetime of his first wife was void within the meaning of said provisions of law. Accused (petitioners), therefore, could not even be prosecuted for the alleged abetment/conspiracy of the said offences. Prosecution of accused in the complaint case, for such reasons, amounted to an abuse of the process of the Court and the same was quashed accordingly. **P L D 1995 Lah. 475.**

Where a Nikah Khawan appointed under the Family Laws Ordinance who contracted a Nikah in violation of the Muslim Family Laws Ordinance was tried by the Magistrate 1st Class, it was *held that* a Nikah Khawan being a public servant cannot be tried without obtaining sanction for prosecution by the competent authority. The offence was held to be triable by Special Judge Anti-Corruption. **N L R 1980 Criminal 385.** A Muslim girl was given in marriage during her maturity by her mother, the girl after attaining majority married another person. The marriage with the first husband was not consummated after attaining majority. It was *held that* her second marriage would annul her first marriage on account of the exercise of right of puberty by her. Therefore, she was not guilty of an offence under Section 494, P.P.C. **P L D 1976 Lah. 516.** The marriage was dissolved by the apostasy of a Muslim husband and the woman married during Iddat. It was *held that* although the second marriage was not a legal marriage, yet the woman cannot be said to have gone through the form of second marriage while a legal husband was alive and was not guilty under Section 494, P.P.C. **1983 P Cr. L J 55.** In the case of marriage during the lifetime of husband, the principle that such marriage must be strictly proved, was held to apply to the trial of the case and not to the allegations made in the complaint. **1977 P Cr. L J 54.** Where the petitioner was convicted under Sections 494 and 498, P.P.C. mainly on oral testimony and no documentary evidence was brought on the record to prove marriage between the complainant and the alleged wife and also about birth and death of children born out of alleged wedlock. Conviction and sentence in the circumstances of the case were held to be improper and set aside. **1977 P Cr. I J 451.**

Ineffectiveness of 'Talaq' : Where the *Talaq* was pronounced in accordance with tenets of Islam and which had otherwise become effective. It was *held that* mere failure to give notice did not render *Talaq* ineffective. Non-compliance with provisions regarding registration of marriage did not invalidate marriage itself. Failure to comply with Section 7 rendered the offender husband liable to imprisonment or fine or both. Respondent had given divorce in writing. Second marriage took place after expiry of 90 days and private complaint was filed yet another 3 months later. In absence of declaration by Civil Court that written divorce deed was not genuine document, continuation of proceeding under Section 494, P.P.C. held, a clear abuse of law. The proceedings were quashed. **1984 P Cr. I J 1352.**

Quashing of proceedings : Complainant's husband being a Muslim male could have as many as four wives at the same time and he could not be charged and prosecuted under Ss. 494 and 495, P.P.C. nor his second marriage with the complainant during the lifetime of his first wife was void within the meaning of said provisions of law. Accused (petitioners),

therefore, could not even be prosecuted for the alleged abetment/conspiracy of the said offences. Prosecution of accused in the complaint case, for such reasons, amounted to an abuse of the process of the Court and the same was quashed accordingly. **P L D 1995 Lah. 475 (a).**

495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted : Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

COMMENTS

This section punishes for the same offence as Section 494 but only in such cases where the fact of former marriage is concealed from the person with whom the subsequent marriage is contracted. Thus this section is an aggravated form of Section 494.

A woman who does not use all reasonable means in her power to inform herself of the fact of her first husband's alleged demise and contracts a second marriage within 16 months after cohabitation with her first husband, without disclosing the fact of the former marriage to her second husband, is liable to enhanced punishment under this section.

496. Marriage ceremony fraudulently gone through without lawful marriage : Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine.

COMMENTS

Object : This section punishes for going through a marriage ceremony fraudulently known that lawful marriage has not been performed. That is to say, the section punishes for mock marriages. The section applies to cases in which a ceremony is gone through which would in no case constitute a marriage and in which one of the parties is deceived by the other into the belief that it does constitute a marriage or in which effect is sought to be given by the proceeding to some collateral purpose.

Ingredients : The section requires two essentials :--

1. Dishonestly or with a fraudulent intention going through the ceremony of marriage.
2. Knowledge on the part of the person going through the ceremony that he is not thereby lawfully married.

497. Adultery : [Rep. by the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979, S. 19].

498. Enticing or taking away or detaining criminal intent a marriage woman : [Rep. by the Offence of Zina (Enforcement of Hudood) Ordinance, VII of 1979, S. 19].

CHAPTER XXI

OF DEFAMATION

This Chapter relates to offence of defamation. Section 499 defines defamation and also explains what does and what does not amount to defamation *vide* its explanation and exceptions. Section 500 punishes for the offence of defamation. Section 501 and 502 form part of the connected Law of Defamation, viz., printing or engraving defamatory matter and the sale thereof.

499. Defamation : Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said except in the cases hereinafter excepted, to defame that person:

Proviso : [Omitted by the Criminal Law (Amendment) Act, IV of 1986.]

Explanation 1 : It may amount to defamation to impute anything to a deceased person, if the imputator would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2 : It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3 : An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4 : No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered a disgraceful.

Illustration

(a) A says: "Z is an honest man; he never stole B's watch"; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

First Exception--Imputation of truth which public good requires to be made or published : It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second Exception--Public conduct of public servants : It is not defamation to express in good faith any opinion whatever respecting the

conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Third Exception--Conduct of any person touching any public question : It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing requisition for a meeting on a public question, in presiding or attending as such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception--Publication of reports of proceedings of Courts : It is not defamation to public a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation : A Justice of the peace or other officer holding an enquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception--Merits of case decided in Court or conduct of witnesses and other concerned : It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustration

(a) A says: "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest," A is within this exception if he says that in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.

(b) But if A says: "I do not believe what Z asserted at that trial because I know him to be a man without veracity," A is not within this exception, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

Sixth Exception--Merits of public performance : It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation : A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

- (a) A person who publishes a book, submits that book to the judgment of the public.
- (b) A person who makes a speech in public, submits that speech to the judgment of the public.
- (c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.
- (d) A says of a book published by Z. "Z's book is foolish; Z must be a weak man. Z's book is indecent; Z must be a man of impure mind." A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no further.
- (e) But if A says: I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine." A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh Exception--Censure passed in good faith by person having lawful authority over another : It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Illustration

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under these orders; a parent censuring in good faith a child in the presence of other children; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in service; a banker censuring in good faith, the cashier of his bank for the conduct of such cashier as such cashier are within this exception.

Eight Exception--Accusation preferred in good faith to authorised person : It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child-Z's father A is within this exception.

Ninth Exception--Imputation made in good faith by person for protection of his or other's interest : It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.

Illustration

(a) A, a shopkeeper, says to B, who manages his business---"Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report of his own superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith, and for the good, A is within the exception.

Tenth Exception--Caution intended for good of person to whom conveyed or for public good : It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

COMMENTS

The Author of the Code says :

"The essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavourable sentiments of his fellow creature, and those inconveniences to which a person who is the object of such unfavourable sentiments is exposed."

Ingredients of section : The offence of defamation consists of three essential ingredients, namely :

- (1) making or publishing any imputation concerning any person;
- (2) such imputation must have been made by words either spoken, or intended to be heard, or by signs or visible representations; and
- (3) the said imputation must have been made with the intention to harm, or with knowledge or having reason to believe that it will harm the reputation of the persons concerned.

According to case of *Abdul Zubair v. State*, offence under Section 499 and Section 402 would be committed only when number of persons assembled for committing dacoity is not less than five. Case would be of further inquiry entitling accused to bail when number of persons assembled were three. **N L R 1996 Cr. L J 196.**

Magistrate cannot take cognizance of complaint when same not transferred to him by District Magistrate under Section 112, Cr.P.C. or by any other Court of competent jurisdiction. **1983 P Cr. L J 1619.**

Makes or 'Publishes' : That the matter must be published, means communicated to some person other than the person to whom it is addressed, e.g., dictating a letter to a clerk in publication. The word is used in the sense as connoting "to make public" or to make known to people.

Defamatory matter written on a post-card, or printed on papers distributed broadcast, constitutes publication. So in the filing in a Court of a petition containing defamatory matter concerning a person with the intention that it should be read by other persons.

Imputations made in respect of any person amount to defamation for the purposes of Section 499 P.P.C. Only if such imputations are published and the person punishing the same

intends to harm or has reasons to believe that such imputations will harm the reputations of the person in respect of whom the imputations are made and published. There is no evidence in this case to suggest or indicate that the imputations made by respondent No. 1 in the application to the Chairman of the Union Committee were made by the respondent with intent to harm the reputation of the petitioner or that the said respondent had reason to believe that the same would harm the reputation of the petitioner. If the imputations had been *per se* defamatory, such as to attribute dishonest, improper or immoral conduct to the petitioner, or any other action which plainly would have the tendency to lower him in the estimation of his relations, friends and acquaintances, it could have been reasonably presumed that the petitioner either had the intention or at least had the knowledge or reasons to believe that such imputation would harm the reputation of the petitioner, but the imputations are not such as can be considered to be *per se* defamatory. **1975 P Cr. L J 1448.**

'Imputation' : It is immaterial whether the imputation is conveyed obliquely or indirectly or by way of question, conjecture, or exclamation, or by irony.

Similarly the imputation that the complainant had sold off his property twice and that Criminal Investigation Department was investigating into it was held to be an allegation imputing fraud to the complainant and thus defamatory. **P L D 1963 Lah. 323.**

Letter containing imputations *prima facie* scathing parents for adopting western culture and allowing freedom to girls and suggesting thereby that they introduced their daughters to certain objectionable environments and encouraged them to indulge in sexual involvements. Scandalising parents and their unmarried daughter was held worst type of defamatory imputation. The mother is competent to file complaint for defamation. **P L D 1971 Kar. 206.**

Publication of defamatory matter in newspaper : The Editor is *prima facie* responsible for defamatory material published in his newspaper. To avoid liability on ground of absence of knowledge entrustment of management to competent person must be proved. **P L D 1963 Lah. 323.**

The amount of care and caution which is required of a journalist or newspaper editor is neither more nor less than that expected from other person. **P L D 1958 Lah. 747.** The publisher of a newspaper is responsible for defamatory matter published in such paper whether he knows the contents of such paper or not. But it would be a sufficient answer to a charge of defamation against the editor of a newspaper if he proved that the libel was published in his absence and without his knowledge and he had in good faith entrusted the temporary management of the newspaper during his absence to a competent person. **P L D 1963 Lah. 323.**

'Intending to harm, or knowing or having reason to believe that such imputation will harm' : That the complainant actually suffered directly or indirectly from the scandalous imputation alleged is a necessary ingredients of the offence it is sufficient to show that the accused intended to harm, or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant. A statement made primarily with the object that the person making it should escape from a difficulty cannot be made the subject of a criminal charge merely because it contains matter which may be harmful to the reputation of other people or hurtful to their feeling.

Explanation 1 : Imputation on the dead are actionable in England. It has been held that defamatory libel on a dead person must be some unusual publication. A prosecution may be maintained for defamation of a deceased person, but no suit for damages will lie.

Explanation 2 : The defamation of an association or collection of persons can be made by publication of an imputation affecting the character or reputation. An association may be defamed by an imputation which lowers the moral character of the members of the association collectively.

Explanation 3 : Some innocent words may be used ironically and constitute aspersion on another. Thus even words of praise may be used in a defamatory sense.

In such cases the complainant or plaintiff has to prove that the words have not been understood in their primary sense but in a different and defamatory sense.

Explanation 4 : This explanation clarifies that by "harm" is meant imputation on a man's character made and expressed to others and not communicated to that man itself.

The imputation that the petitioner had been paid Rs. 1,000 for the hand of daughter in marriage is not an imputation which either *per se* could be considered as defamatory or could have the effect of lowering the petitioner in the estimation of his friends and relation as it is not uncommon in certain communities and classes of people to ask for bride-money. Furthermore, neither the petitioner himself nor any other witness cited by him has stated that as a result of the above imputations, either the reputation of the petitioner had been harmed or that he had been lowered in the estimation of others. Explanation 4 to Section 499, P.P.C. provides that no imputation is said to harm a person's reputation, unless the imputations, directly or indirectly, in the estimation of others, lowers the morale or intellectual character of the person, or lowers the character of that person in respect of his caste or the credit of that person. The bald allegation by the petitioner that the imputations published against him by respondent No. 1 are defamatory cannot be considered to be enough for reaching the conclusion that they are in fact defamatory or that the character of the petitioner has been injured by such imputations or he has been lowered by such imputation in the estimation of others. **1975 P Cr. L J 1448.**

Exceptions : The exceptions affected to the section cover the entire field of privileges available in cases of defamation. A defamatory statement not falling within the specified Exceptions mentioned in this section is not privileged.

Exception 1 : Exceptions 1 and 9 codify those portions of the Law of libel and Slander treated in British Text-Books under the heads of justification and qualified privilege. The two requirements of the first exception are that the impugned statement must be shown to be true and that its publication must be shown to be for public good. The proof of truth which is one of the ingredients of the first exception is not an ingredient of the 9th exception.

This exception must be read subject to Section 79 of the Penal Code, Imputations not true in fact but believed in good faith to be true, if its publication is for public good, will be covered by this exception. **P L D 1958 Lah. 747.**

The truth of imputation will be sufficiently proved if the imputation is substantially true. The onus is discharged if the accused can prove reasonable grounds for believing that the imputation was true and that he had no malicious motive. Fact of imputation being factually incorrect is not by itself sufficient for conviction. **P L D 1967 S C 32.**

Exception 2 : This Exception differs from Exception 1 in this that while the first deals with an expression of opinion this deals with allegations of fact. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander. Where a person makes the public

conduct of a public man the subject of comment and it is for the public good, he is not liable to an action if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no wilful misrepresentation of fact or any mis-statement which he must have known to be a mis-statement, if he had exercised ordinary care. In order that a comment may be fair (a) it must be based on facts truly stated, (b) it must not impute corrupt or dishonourable motives to the person whose conduct or work is criticised except in so far as such imputations are warranted by the facts, (c) it must be the honest expression of the writers real opinion made in good faith, and (d) it must be for the public good. The question to be considered in such cases is, would any fair man however prejudiced he might be or however exaggerated or obstinate his views, have made the criticism. **A I R 1943 Nag. 317.**

Exception 3 : There are public men who are not public servants but yet take active part in measures of great interest to the community. Every person ought to be allowed to comment in good faith on the proceedings of these volunteer servants of the public. Thus where, a medical man and the editor of a medical journal, said in such journal of an advertisement published by another medical man, in which the latter solicited the public to subscribe to hospital of which he was surgeon-in-charge stating the number of successful operations which had been performed, that it was unprofessional. It was *held that* inasmuch as such advertisement had the effect of making such hospital a "public question" the editor was within the third, sixth and ninth Exceptions.

Exception 4 : What is needed by this exception is that the report of the proceedings of a Court of Justice shall be substantially true even though it only not be for public good in good faith is not necessary ingredient of this exception. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. The general advantage to the country in having these proceedings made public more than counter-balances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

Exception 5 : Cockburn, C.J. observed : The administration of justice is a matter of universal interest to the whole public. The judgment of the Court, the verdict of the Jury, the conduct of parties and of witness, may all be made subjects of free comment. But the criticism should be made in good faith and should be fair. It must not want only assail the character of others or impute criminality to them. But in commenting on such matters, a public writer as much as a private writer, is bound to attend to the truth, and to put forward the truth honestly and in good faith and to the best of his knowledge and ability. It is not to be expected that in discharging his duty of a public journalist he will always be infallible. His judgment may be biased, one way or the other, without the slightest reflection upon his good faith; and, therefore, if his comments are fair, no one has a right to complain.

Exception 6 : The object of this Exception is that the public should be aided by comments its judgment of the public performance submitted to its judgment. Comment otherwise defamatory is justified on this ground alone. Liberty of criticism is allowed, otherwise we should neither have purity of taste nor of morals. Good faith under this Exception requires not logical infallibility but due care and attention. A matter that invites public attention or is open to public discussion or criticism becomes a matter of public interest.

Exception 7 : This Exception allows a privilege for censure by one person against another. The person censuring must have either contractual or legal authority over the

censured, the censure must relate to be conduct covered by the authority and should be made in good faith. The Exception allows a person under whose authority others have been placed, either by their own consent or by the law, to censure, in good faith, those who are so placed, under his authority so far as regards the matter to which that authority relates. But if this privilege is exceeded in any way the offence will be established. A man may in good faith complain of the conduct of a servant to the master of the servant even though the complaint amounts to defamation, but he is not protected if he publishes the complaint in a newspaper. A spiritual superior, in pronouncing and publishing a sentence of ex-communication may be protected by privilege so long as the publication is not more extensive than is required to effectuate the purpose for which the privilege is conceded to him for the censure of a member of the sect in matters appertaining to religion or the communication of a sentence he is authorized to pronounce to those who are to guide themselves by it.

Exception 8 : An accusation made to a person in authority over the party accused, preferred in good faith is protected under this clause. Thus where the accused made an imputation in good faith to the father of the person whose character was attached the case was held to be covered by this exception. **P L D 1966 Kar. 337.**

The imputations were contained in an application made to the Chairman of the Union Committee, with the request that action be taken against the petitioner and his companions for an offence under Section 323/34, P.P.C. Since the Chairman was the person to whom such applications are required to be made under the Conciliation Courts Ordinance, 1961 he undoubtedly is a person who had lawful authority over the petitioner with respect to the accusation of assault and beating. In view of these circumstances, the application made by respondent No. 1 and bearing the endorsement of respondent No. 2, who was then a member of the Union Committee concerned, would be protected under the 8th Exception to Section 499, P.P.C. **1975 P Cr.L J 1448.**

Allegations that petitioner had never got peace of mind and his better-half was of 'loose tongue' by no stretch of imagination comes within purview of Section 530, P.P.C. Allegations at the most show-causes having not been getting on well and not leading happy domestic life. **P L D 1982 Lah. 60.**

Exception 9 : This Exception protects, defamatory statements made in good faith for the protection of the interests of the person making it.

In determining the question of good faith regard should be had to be intellectual capacity of the accused, his predilections and the surrounding facts. The standard of care and caution required by the expression "good faith" varies with the circumstances of each case.

Privileges in judicial proceedings : So far as English Law is concerned, absolute privilege is concerned in respect of all statements made by parties, witness counsel, etc., if they are made directly in relation to the judicial proceedings. The English Law of absolute privilege does not apply in this country to statements of Advocates in judicial proceedings. **A I R 1925 Rang. 345.** The privilege of parties, counsel, attorney, pleader and witnesses come under this Exception. So also statements made in pleadings and reports to superior officers are protected by it.

Where a husband in a notice sent to the Chairman of the Union Council alleged that his wife whom he has divorced and in accordance with provisions of Family Laws Ordinance, he is sending a notice to the Chairman stated that his wife was of a bad character. The Court held

that the occasion was privileged and the husband was not liable for prosecution for defamation in the absence of express malice. **P L D 1982 Lah. 60.**

Witness : A witness, who, being actuated by malicious motives makes a voluntarily and irrelevant statement, not elicited by any question put to him while under examination, to injure the reputation of another, commits an offence under this section. If the statement is relevant to the inquiry no prosecution would lie. **(1989) 27 Cal. 262.**

Statements of witnesses made in the witness-box are absolutely privileged. If they are false the remedy is by indictment for perjury and not for defamation. A statement made in answer to question put by a police-officer under the Criminal Procedure Code, Section 161, in the course of investigation made by him, is privileged and cannot be made the foundation of a charge of defamation. **(1898) 16 Mad. 235.**

Statements made in judicial proceedings are not absolutely privileged. **P L D 1976 Lah. 1548.**

Parties : The statement of a person charged with an offence in answer to a question by the Court is absolutely privileged. Subsequently, this case has been considered in another Full Bench case and the High Court has dissented from the view expressed in it, observing: "The privilege defined by the Exceptions to Section 499 of the Penal Code must be regarded as to the case which they purport to cover and that recourse cannot be had to the English common law to add new grounds of exception to those contained in the statute". It was also *held that* if a defamatory statement is made before an officer who is neither a judicial officer nor a Court, e.g., a Registration Officer, such a statement is not absolutely privileged. **(1912) 23 M L J 50.**

Pleadings : The statements made in a written statement filed by the accused are not absolutely privileged but are governed by the provisions of this section.

Defamatory statements are not privileged merely because they are used in a petition preferred in a judicial proceeding, but good faith, as required in this Exception, should be proved. Where in an application for the transfer of a criminal case the applicants alleged with some apparent reason that the case had been falsely got up against them by the complainant at the instigation of one U, in order to prejudice them in their defence in a civil suit which U had caused to be brought against them, it was *held that* this statement did not amount to defamation as it fell within the Ninth Exception. **(1925) 50 Bom. 165 (Supp.).**

Exception 10 : This Exception protects a person giving caution in good faith to another for the good of that other, or of some person in whom that other is interested or for public good.

To bring the case within this exception it must be proved that the accused intended in good faith to convey a caution to one person against another that such caution was conveyed for the good of the person to whom it was conveyed, or of some person in whom that person was interested, or for public good and that caution should be conveyed by proper means. This exception for instance will apply where one man warns another against employing a third person in his service saying that he is a dishonest person. **1979 S C M R 545.**

Preliminary enquiry : High Court while dismissing the complaint against specified respondents apparently did not advert to the statement of the complainant on oath recorded during the enquiry proceedings and its judgment did not appear to be based on proper analysis of the evidence produced by the complainant before it. Appeal was consequently allowed with the direction to High Court for holding further inquiry and to reconsider the existence or non-existence of the *prima facie* case against the respondents in the light of the observations made by Supreme Court. **1998 S C M R 922.**

500. Punishment for defamation : Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both:

Proviso : *[Omitted by the Criminal Law (Amendment) Act, IV of 1986.]*

COMMENTS

Object : This section provides punishment for the offence of defamation. Definition whereof has been given in last preceding section. The applicant and his wife prayed for quashment of defamation proceedings under Section 500, P.P.C. initiated by the respondent who claimed to be the Honorary Secretary of the Pakistan Post Office Employees' Co-operative Housing Society. The complaint, *inter alia*, contained the allegation that the wife of the petitioner had owned certain survey numbers of land measuring about 84 acres in Karachi and she had conferred the power to sell her share in the said land and had executed a registered power-of-attorney. That the wife of the petitioner at the behest of her husband got a scandalous and defamatory notice published in a newspaper. The Court while quashing the criminal proceedings *held that* the alleged notice showed no imputation causing harm to the reputation of the contesting respondent. It observed: "On perusal of the contents of notice published by Mst. Sahibi, I am not able to read any imputation, which could harm the reputation of the society. It is an ordinary notice denying the existence of any agreement. Such notices are issued by the affected parties daily and it does not lead to any conclusion that any party against which such notice has been issued is either dishonest or that it has misappropriated the money of its members." **1980 P Cr. L J 173.**

Magistrate after recording preliminary evidence of the complainant had issued process against the accused which prompted them to move the High Court successfully for quashing of the proceedings without waiting for the recording of evidence in the case. Accused did not appear to have specifically controverted the factual allegations made by the complainant regarding the issuance of letter to Central Board of Revenue containing the imputations against him. Leave to appeal was granted to consider the contention that the intention of the accused in issuance of the said letter regarding the imputation being *bona fide* or *mala fide* could only be properly gone into after some evidence had been recorded in the case and no positive finding was possible on the bald allegation and counter-allegation of the parties. **1995 S C M R 1004.**

Cognizance of offence under Section 500, P.P.C. by Magistrate : Police may investigate into an offence under Section 500, P.P.C. on the direction of a Magistrate but the trial Magistrate cannot competently take cognizance of the said offence in pursuance of the report submitted by the police under Section 173, Cr.P.C., the same having been specifically barred under Section 198, Cr.P.C. which can only be taken on a complaint made by the aggrieved person. **1997 P Cr. L 1128.**

The Magistrate took cognizance of case under Section 500, Penal Code on challan submitted by the Police. The proceedings before the Magistrate, were an abuse of Court and quashed. **1983 P Cr. L J 1619.**

Appeal against acquittal : Offence under Section 500, P.P.C. on the date of its alleged commission by the accused inclusive of the date on which the complaint was filed was not only cognizable but was also non-compoundable. Rights or liabilities of the parties to the

proceedings being governed by the statute as it prevailed on the date when action was commenced notwithstanding the repeal or omission of any particular provision of such statute subsequently, omission of the provisions to Ss. 499 and 500, P.P.C. by Act IV of 1986 would not affect the validity and the applicability of the said provisos inserted by the Criminal Law (Amendment) Ordinance, 1979 to the pending cases. Second proviso to S. 247, Cr.P.C. having been fully attracted in the case, the impugned order dismissing the complaint for non-appearance of the complainant and acquitting the accused was not competently passed by the Trial Court as the offence under S. 500, P.P.C. was cognizable as well as non-compoundable. Impugned order was, consequently, set aside being without any lawful authority and of no legal consequence and the case was remanded to Trial Court for disposal within a specified period in accordance with law. **P L D 1998 Quetta 37.**

501. Printing or engraving matter known to be defamatory : Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

COMMENTS

This is a distinct offence from the one under Section 501. **P L D 1958 Lah. 747.** The person printing or engraving defamatory matter abets the offence. This section makes such abetment a distinct offence.

Ingredients : This section requires two things :--

1. Printing or engraving of any matter.
2. Knowledge or reason to believe that such matter is defamatory.

502. Sale of printed or engraved substance containing defamatory matter : Whoever sells or offers for sale any printed or engraved substance containing defamatory matter knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

OF CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE

503. Criminal intimidation : Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Explanation : A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

COMMENTS

Criminal intimidation is closely analogous to extortion. In extortion the immediate purpose is obtaining money or money's worth; in criminal intimidation, the immediate purpose is to induce the person threatened to do, or abstain from doing something which he was not legally bound to do or omit.

Ingredients : This section has the following essentials :--

1. Threatening a person with any injury--
 - (i) to his person, reputation, or property; or
 - (ii) to the person or reputation of any one in whom that person is interested.
2. Threat must be with intent--
 - (a) to cause harm to that person, or
 - (b) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat, or
 - (c) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

Word "will, I well see you", do not constitute an offence under Section 506. **P L D 1976 Lah. 144; P L J 1976 Lah. 777.**

504. Intentional insult with intent to provoke breach of the peace : Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

COMMENTS

Object : This section is intended to deal with persons who are as responsible for breaches of the peace or the commission of offences as those who openly abet or incite them. **A I R 1942 Mad. 672.** An imputation not defamatory may be uttered in the hearing of the

person who is the object of it, for the purpose of provoking that person to break the public peace. If so, it is punishable under this section. A person also comes within the ambit of the section if the provocation offered by him is of such a character as to cause the provoked "to commit any other offence." **A I R 1927 Lah. 129(2).**

Sections 504 and 426 : Non-consideration of worth of document regarding claim of *bona fide* right in disputed property is fatal for trial. **P L D 1964 Dacca 170.**

Ingredients : This section requires :--

1. Intentional insult.
2. The insult must be such as to give provocation to the person insulted.
3. Intention that such provocation should cause, or knowledge that such provocation was likely to cause, the person so insulted to break the public peace or to commit any other offence.

505. Statements conducing to public mischief : (1) Whoever makes, publishes, or circulates any statement, rumour or report,--

- (a) with intent to cause or incite, or which is likely to cause or incite, any officer, soldier, sailor, or airman in the Army, Navy or Air Force of Pakistan to mutiny, offence or otherwise disregard or fail in his duty as such ; or
- (b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity ; or
- (c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community,

shall be punished with imprisonment for a term which may extend to seven years and with fine.

(2) Whoever makes, publishes or circulates any statement or report containing rumour or alarming news with intent to create or promote, or which is likely to create or promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, shall be punished with imprisonment for a term which may extend to seven years and with fine.

Explanation : It does not amount to an offence within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it in good faith and without any such intent as aforesaid.

506. Punishment for criminal intimidation : Whoever commences the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

If threat be to cause death or grievous hurt, etc. : And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

COMMENTS

Scope : This section punishes for the offence of criminal intimidation defined under Section 503. In certain circumstances mentioned in the section the punishment is greater.

The accused were elderly persons of sufficiently advanced ages of 70/72 years and matter proceeded no further than verbal criminal intimidation. Sentence of 25 years' rigorous imprisonment already undergone by accused, was sufficient to meet ends of justice, in circumstances. **1983 P Cr. L J 633.**

F.I.R. had no allegation to the effect that the complainant was threatened by the accused for causing any injury to his person, reputation or property, or to the person or reputation of any one in whom the complainant was interested. Offence of criminal intimidation punishable under Section 506, P.P.C. was, therefore, not made out. Proceedings against the accused were ordered to be quashed. **1995 M L D 567.**

Leave to appeal : High Court on finding the petitioner (Magistrate) to have unnecessarily adjourned the application of accused moved under Section 249-A, Cr.P.C., on innumerable dates of hearing, had directed the remarks about his inefficiency and shirking of duty to be recorded in his Annual Confidential Report. Leave to appeal was granted by Supreme Court to consider the contention that the said order had been made by the High Court without giving an opportunity to the petitioner who had been condemned unheard. **1998 S C M R 2618.**

Quashing of order of Magistrate summoning the accused : Magistrate after having assessed the evidence recorded at the preliminary stage in the complaint had summoned the accused to face the trial for having forced their entry in the land of the complainant which even according to the accused was jointly held by all of them alongwith the complainant being a joint Khata. None of the accused being a party in the civil suit pending regarding the disputed land the same could not in any way close down the criminal process arising out of the alleged offences attributed to the accused. Impugned order passed by the Magistrate summoning the accused being well within law, proceedings initiated against them could not be quashed at such stage. Petition was dismissed *in limine* accordingly. **1997 M L D 2075.**

Quashing of proceedings : Contentions were that the F.I.R. which had been lodged after an inordinate delay of 27 days only contained vague allegations and did not disclose the commission of any cognizable offence and that no evidence whatsoever was available against the accused and the prosecution case was based only on conjectures and surmises. Prosecution had no objection to the quashing of proceedings as the accused were facing the agony of trial for the last more than two years. Proceedings pending against the accused in the Court of Magistrate were quashed in circumstances. **1996 P Cr. L J 1508.**

F.I.R. had no allegation to the effect that the complainant was threatened by the accused for causing any injury to his person, reputation or property, or to the person or reputation of any one in whom the complainant was interested. Offence of criminal intimidation

punishable under Section 506, P.P.C. was, therefore, not made out. Proceedings against the accused were ordered to be quashed. **1995 M L D 567(b).**

Complainant had filed a sketchy and vague private complaint against accused about an incident which was neither witnessed by anybody nor even the time of its occurrence including the date, month and year had been disclosed therein. Complainant also did not approach the concerned police immediately after the alleged incident and had turned a civil right into a criminal liability. Since Magistrate had taken cognizance against the accused without applying his mind to the facts of the case and the continuation of criminal proceedings in his Court would tantamount to an abuse of process of law, the same were quashed. **1997 P Cr. L J 1030.**

507. Criminal intimidation by an anonymous communication : Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

COMMENTS

This section acts as a corollary to Section 506. If the criminal intimidation is by an anonymous letter, or by a letter signed with a false name, the offence will be subject to higher punishment under this section as it causes great alarm to the recipient of the letter.

For a conviction under this section it must be shown that the accused committed criminal intimidation by using threats of injury which he was in a position to put into execution. The injury need not be one to be inflicted by himself personally, but it is enough if he can cause it to be inflicted by another. Hence a person who extorts money by sending anonymous letters as if from God, conveying threats of Divine punishment if a specified sum of money be not paid to a certain person identifiable by the description given in the letters, cannot be convicted under this section as it does not lie in his power either to inflict the threatened punishment, or cause it to be inflicted.

508. Act caused by inducing person to believe that he will be rendered an object of Divine displeasure : Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of Divine displeasure if he does not to the thing which it is the object of the offender to cause him to do, or if he does the thing which it is object of the offender to cause to him to omit shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Illustration

(a) A sues dhurna at Z's door with the intention of causing it to be believed that, by so sitting, he renders Z an object of divine displeasure, A has committed the offence defined in this section.

(b) A threatens Z that, unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of Divine displeasure. A has committed the offence defined in this section.

509. Word, gesture or act intended to insult the modesty of a woman : Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

COMMENTS

This section punishes for uttering any word, or making any sound or gesture, or exhibiting any object, with intent that such word or sound be heard or gesture or object be seen by woman. It also punishes for intruding upon the privacy of that woman with intent to insult her modesty.

Ingredients : This section requires the following essentials :--

- (1) Intention to insult the modesty of a woman.
- (2) The insult must be caused--
 - (i) by uttering any word, or making any sound or gesture, or exhibiting any object intending that such word or sound shall be heard or that the gesture or object shall be seen by such woman, or
 - (ii) by intruding upon the privacy of such woman.

510. Misconduct in public by a drunken person : Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both.

COMMENTS

This section punishes for annoying conducts of drunken persons in public places. Mere intoxication is not enough. His act causing annoyance is the gist of offence.

OF ATTEMPTS TO COMMIT OFFENCES

This is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not those punishable with death only.

511. Punishment for attempting to commit offences punishable with imprisonment for life or for a shorter terms : Whoever attempts to commit an offence punishable by this Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence for a term which may extend to one-half of the longest term of imprisonment provided for that offence or with such fine ¹[*daman*] as is provided for the offence, or with both.

Illustrations

(a) A makes an attempt to steal some jewels by breaking open the box, and finds after so opening the box, that there is no jewels in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket, A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

COMMENTS

Scope : This section does not apply to attempts to commit murder which are fully and exclusively provided for by Section 307. The former Chief Court of the Punjab had laid down that this section was "in terms much wider than Section 307, under the last-mentioned section (S. 307), the act done must....be one capable of causing death, and it must also be the last proximate act necessary to constitute the completed offence; under Section 511 the act may be any act in the course of the attempt towards commission of the offence."

This section does not apply to cases of dacoity.

The contention that occurrence had taken place about 7 years back and accused had faced a protected trial and remained in custody for little more than 2 months. The sentence of one year's rigorous imprisonment might be reduced to period already undergone by him. The contention, had no force and sentence already awarded to accused the very lenient. The sentence was maintained, in circumstances. **1983 P Cr. L J 562.**

1. Word added by the Criminal Law (Amendment) Act, II of 1997.

Attempt--Test: Attempt to commit a crime consists of intent to commit the crime; performance of some act towards the commission of the crime and failure to consummate its commission on account of circumstances beyond the control of the offender. Test whether there has been an attempt to commit a crime, is a factual one by reference to the said three ingredients. **1996 M L D 878.**

"Attempt", description of : Attempt is an act done in part execution of a criminal design amounting to more than mere preparation, but falling short of actual consummation and possessing, except for failure to consummate, all the elements of the substantive crime. **1995 PCr.LJ 877 (c).**

Appeal against acquittal : Appeal having been instituted much beyond the statutory period of 30 days was barred by limitation and the grounds advanced in the application for condonation of delay having not constituted a sufficient cause for such condonation, the same was dismissed. Even otherwise the accused was charged by the Trial Court for having attempted to abduct for ransom and not for having abducted for ransom as provided by Section 365-A, P.P.C. Section 511, P.P.C. which deals with the offences pertaining to attempts had not been included in the Schedule attached to the Suppression of Terrorist Activities (Special Courts) Act, 1975. Trial held by Special Court, therefore, was without jurisdiction and the same stood vitiated. Appeal against acquittal of accused was dismissed accordingly. **1996 M L D 202.**

**The
Offences Against Property
(Enforcement of Hudood)
Ordinance
(VI OF 1979)**

[10th February, 1979]

**An Ordinance to bring in conformity with the
injunctions of Islam the law relating to
certain offences against property**

Preamble : Whereas it is necessary to modify the existing law relating to certain offences against property, so as to bring it in conformity with the injunctions of Islam as set out in the Holy Qur'an and Sunnah :

And whereas the President is satisfied that circumstances exist which render it necessary to take immediate action ;

Now, therefore, in pursuance of the Proclamation of the Fifth day of July, 1977, read with the Laws (Continuance in Force) Order, 1977 (C. M. L. A. Order No. 1 of 1977), and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance :—

PRELIMINARY

1. Short title, extent and commencement : (1) This Ordinance may be called the Offences Against Property (Enforcement of 'Hudood') Ordinance, 1979.

(2) It extends to the whole of Pakistan.

(3) It shall come into force on the twelfth day of Rabi-ul-Awwal, 1399 Hijri, that is the tenth day of February, 1979.

2. Definitions : In this Ordinance, unless there is anything repugnant in the subject or context,—

(a) "adult" means a person who has attained the age of eighteen years of puberty ;

- (b) "authorised medical officer" means a medical officer, whosoever designated, authorised by Government ;
- (c) "hadd" means punishment ordained by the Holy Qur'an or Sunnah ;
- (d) "hirz" means an arrangement made for the custody of property :

Explanation 1 : Property placed in a house, whether its door is closed or not or in an almirah or a box or other container or in the custody of a person, whether he is paid for such custody or not is said to be in "hirz".

Explanation 2 : If a single family is living in a house, the entire house will constitute a single 'hirz' but if two or more families are living in one house severally, the portion in the occupation of each family will constitute a separate 'hirz'.

- (e) "imprisonment for life" means imprisonment till death ;
- (f) "nisab" means the 'nisab' as laid down in Section 6 ;
- (g) "tazir" means any punishment other than 'hadd' and all other terms and expressions not defined in this Ordinance shall have the same meaning as in the Pakistan Penal Code (Act XLV of 1860), or the Code of Criminal Procedure, 1898 (Act V of 1898).

3. Ordinance to override other laws : The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.

4. Two kinds of theft : Theft may be either theft liable to 'hadd' or theft liable to 'tazir'.

5. Theft liable to hadd : Whoever, being an adult, surreptitiously commits, from any 'hirz', theft of property of the value of the 'nisab' or more not being stolen property, knowing that it is or is likely to be of the value of the 'nisab' or more is, subject to the provisions of this Ordinance, said to commit theft liable to 'hadd.'

Explanation 1 : In this section "stolen property" does not include property which has been criminally

misappropriated or in respect of which criminal breach of trust has been committed.

Explanation 2 : In this section, "surreptitiously" means that the person committing the theft commits such theft believing that the victim of theft does not know of his action. For surreptitious removal of property it is necessary that, if it is day-time, which includes one hour before sunrise and two hours after sunset, surreption should continue till the completion of the offence and, if it is night, surreption need not continue after commencement of the offence.

6. Nisab : The 'nisab' for theft liable to 'hadd' is four decimal four five seven (4.457) grams of gold, or other property of equivalent value, at the time of theft.

Explanation : If theft is committed from the same 'hirz' in more than one transaction, or from more than one 'hirz' and the value of the stolen property in each case is less than the 'nisab', it is not theft liable to 'hadd' even if the value of the property involved in all the cases adds up to or exceeds, the 'nisab'.

Illustrations

(a) A enters a house occupied by a single family and removes from various rooms property the value of which adds up to, or exceeds the 'nisab'. Such theft is liable to 'hadd' even though the value of the property removed from any of the rooms does not amount to the 'nisab'. If the house is occupied by more than one family and the value of the property removed from the 'hirz' of any one family is less than the 'nisab', then the theft is not liable to 'hadd' even though the value of the properties removed adds up to, or exceeds, the 'nisab'.

(b) A enters a house several times and removes from the house on each occasion property the value of which does not amount to the 'nisab'. Such theft is not liable to 'hadd' even though the value of the properties removed adds up to, or exceeds the 'nisab'.

7. Proof of theft liable to hadd : The proof of theft liable to 'hadd' shall be in one of the following forms, namely :—

- (a) the accused pleads guilty of the commission of theft liable to 'hadd'; and
- (b) at least two Muslim adult male witnesses, other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of 'tazkiyah-al-shuhood', that they are truthful persons and abstain from major sins (kabair), give evidence as eye-witnesses of the occurrence :

Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslim :

Provided further that the statement of the victim of the theft or the person authorised by him shall be recorded before the statement of the eye-witnesses are recorded.

Explanation : In this section, "tazkiyah-al-shuhood" means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.

8. Commission of theft liable to 'hadd' by more than one person : Where theft liable to 'hadd' is committed by more than one person and the aggregate value of the stolen property is such that, if the property is divided equally amongst such of them as have entered the 'hirz' each one of them gets a share which amounts to, or exceeds, the 'nisab' the 'hadd' shall be imposed on all of them who have entered the Hirz, whether or not each one of them has moved the stolen property or any part thereof.

9. Punishment of theft liable to 'hadd' : (1) Whoever commits theft liable to 'hadd' for the first time shall be punished with amputation of his right hand from the joint of the wrist.

(2) Whoever commits theft liable to 'hadd' for the second time shall be punished with amputation of his left foot up to the ankle.

(3) Whoever commits theft liable to 'hadd' for the third time, or any time subsequent thereto, shall be punished with imprisonment for life.

(4) Punishment under sub-section (1) or sub-section (2) shall not be executed unless it is confirmed by the Court to which an appeal from the order of conviction lies, and, until the punishment is confirmed and executed the convict shall be dealt with in the same manner as if sentenced to simple imprisonment.

(5) In the case of a person sentenced to imprisonment for life under sub-section (3), if the [Appellate Court] is satisfied that he is sincerely penitent, he may be set at liberty on such terms and conditions as the Court may deem fit to impose.

1. Words subs. for the 'High Court' by the Offences Against Property (Enforcement of Hudood) (Amendment) Ordinance, XIX of 1980, Sec. 2.

(6) Amputation shall be carried out by an authorised medical officer.

(7) If, at the time of the execution of 'hadd' the authorised medical officer is of the opinion that the amputation of hand or foot may cause the death of the convict, the execution of 'hadd' shall be postponed until such time as the apprehension of death ceases.

10. Cases in which Hadd shall not be imposed :
'Hadd' shall not be imposed in the following cases, namely :—

- (a) when the offender and victim of the theft are related to each other as—
 - (i) spouses ;
 - (ii) ascendants, paternal or maternal ;
 - (iii) descendants, paternal or maternal ;
 - (iv) brothers or sisters of father or mother ; or
 - (v) brothers or sisters or their children ;
- (b) when a guest has committed theft from the house of his host ;
- (c) when a servant or employee has committed theft from the 'hirz' of his master or employer to which he is allowed access ;
- (d) when the stolen property is wild-grass, fish, bird, dog, pig, intoxicant, musical instrument or perishable foodstuffs for the preservation of which provision does not exist ;
- (e) when the offender has a share in the stolen property the value of which, after deduction of his share, is less than the 'nisab' ;
- (f) when a creditor steals his debtor's property the value of which after deduction of the amount due to him, is less than the 'nisab' ;
- (g) when the offender has committed theft under 'ikrah' or 'iztrar'.

Explanation : In this clause—

- (i) "*Ikrah*" means putting any person in fear of injury to the person, property or honour of that or any other person ; and

(ii) "*iztrar*" means a situation in which a person is in apprehension of death due to extreme hunger or thirst ;

(h) when the offender, before his apprehension, has, on account of repentance, returned the stolen property to the victim and surrenders himself to the authority concerned.

11. Cases in which Hadd shall not be enforced :

(1) 'Hadd' shall not be enforced in the following cases, namely :—

(a) when theft is proved only by the confession of the convict but he retracts his confession before the execution of 'hadd' ;

(b) when theft is proved by testimony, but before the execution of 'hadd', any witness resiles from his testimony so as to reduce the number of eye-witnesses to less than two ;

(c) when, before the execution of 'hadd' the victim withdraws his allegation of theft or states that the convict had made a false confession or that any of the eye-witnesses have deposed falsely, and the number of eye-witnesses is thereby reduced to less than two ; and

(d) when the left hand or the left thumb or at least two fingers of the left hand or the right foot of the offender are either missing or entirely unserviceable.

(2) In the case mentioned in clause (a) of sub-sec. (1) the Court may order retrial.

(3) In a case mentioned in clause (b), or clause (c), or clause (d) of sub-section (1), the Court may award 'tazir' on the basis of the evidence on record.

12. Return of stolen property : (1) If the stolen property is found in the original or in an identifiable form, or in a form into or for which it may have been converted or exchanged, it shall be caused to be returned to the victim, whether it is in the possession of, or has been recovered from, the offender or any other person.

(2) If the stolen property is lost or consumed while in the offender's possession and the 'hadd' is enforced against him the offender shall not be required to pay compensation.

13. Theft liable to Tazir : Whoever commits theft which is not liable to 'hadd' or for which proof in either of the forms mentioned in Section 7 is not available, or for which 'hadd' may not be imposed or enforced under this Ordinance, shall be liable to Tazir.

14. Punishment for theft liable to Tazir : Whoever commits theft liable to 'tazir' shall be awarded the punishment provided for the offence of theft in the Pakistan Penal Code (Act XLV of 1860).

15. Definition of 'Haraabah' : When any one or more persons, whether equipped with arms or not, make show of force for the purpose of taking away the property of another and attack him or cause wrongful restraint or put him in fear of death or hurt such person or persons, are said to commit 'haraabah'.

16. 'Proof of 'Haraabah' : The provisions of Section 7 shall apply *mutatis mutandis* for the proof of *haraabah*.

17. Punishment of 'Haraabah' : (1) Whoever, being an adult, is guilty of *haraabah* in the course of which neither any murder has been committed nor any property has been taken away shall be punished with whipping not exceeding thirty stripes and with rigorous imprisonment until the Court is satisfied of his being sincerely penitent :

Provided that the sentence of imprisonment shall in no case be less than three years.

(2) Whoever, being an adult, is guilty of *haraabah* in the course of which no property has been taken away but hurt has been caused to any person shall, in addition to the punishment provided in sub-section (1), be punished for causing such hurt in accordance with such other law as may for the time being be applicable.

(3) Whoever, being an adult, is guilty of *haraaba* in the course of which no murder has been committed but

property the value of which amounts to or exceeds, the *nisab* has been taken away shall be punished with amputation of his right hand from the wrist and of his left foot from the ankle :

Provided that, when the offence of *haraabah* has been committed conjointly by more than one person, the punishment of amputation shall be imposed only if the value of share of each one of them is not less than the *nisab* :

Provided further that, if the left hand or the right foot of the offender is missing or is entirely unserviceable, the punishment of amputation of the other hand or foot, as the case may be, shall not be imposed, and the offender shall be punished with rigorous imprisonment for a term which may extend to fourteen years and with whipping not exceeding thirty stripes.

(4) Whoever, being an adult, is guilty of *haraabah* in the course of which he commits murder shall be punished with death imposed as *hadd*.

(5) Punishment under sub-section (3), except that under the second proviso thereto, or under sub-section (4), shall not be executed unless it is confirmed by the Court to which an appeal from the order of conviction lies, and if the punishment be of amputation, until it is confirmed and executed, the convict shall be dealt with in the same manner as if sentenced to simple imprisonment.

(6) The provisions of sub-section (6) and sub-section (7) of Section 9 shall apply to the execution of the punishment of amputation under this section.

18. Cases in which punishment of amputation or death for 'haraabah' shall not be imposed or enforced : The punishment of amputation or death shall not be imposed or enforced for the offence of *haraabah* in cases in which *hadd* may not be imposed for theft liable to *hadd* and the provisions of Section 10 and Section 11 shall apply *mutatis mutandis* to such cases.

19. Return of property taken away during 'haraabah' : The provisions of Section 12 shall apply *mutatis mutandis* for return of the property taken away during *haraabah* so, however, that sub-section (2) of the

said section shall have effect as if, for the word *Hadd* therein, the words "punishment of amputation or death" were substituted.

20. Punishment for 'haraabah' liable to tazir : Whoever commits *haraabah* which is not liable to the punishment provided for in Section 17, or for which proof in either of the forms mentioned in Section 7 is not available, or for which punishment of amputation or death may not be imposed or enforced under this Ordinance, shall be awarded the punishment provided in the Pakistan Penal Code (Act XLV of 1860) for the offence of dacoity, robbery or extortion, as the case may be.

21. Punishment for "Rassagiri", or "Patharidari" : (1) Whoever extends patronage, protection or assistance in any form to, or harbours, any person or group of persons engaged in the theft of cattle, on the understanding that he shall receive one or more of the cattle in respect of which the offence is committed, or a share in the proceeds thereof, is said to commit "*Rassagiri*" or "*Patharidari*".

(2) Whoever commits "*Rassagiri*", or "*Patharidari*" shall be punished with rigorous imprisonment for a term which may extend to fourteen years, or with whipping not exceeding seventy stripes, and with confiscation of all his immovable property and with fine.

22. Punishment for attempt to commit offence punishable by this Ordinance : Whoever attempts to commit an offence punishable under this Ordinance, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall where no express provision is made by this Ordinance for the punishment or such attempt, be punished with imprisonment of either description for a term which may extend to ten years.

Illustrations

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He can do an act towards the commission of theft, and therefore, is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

23. Application of certain provisions of Pakistan Penal Code (Act XLV of 1860) : (1) Unless otherwise expressly provided in this Ordinance, the provisions of Sections 34 to 38 of Chapter II, Section 71 and Section 72 of Chapter III and Section 149 of Chapter VIII of the Pakistan Penal Code (Act XLV of 1860), shall apply, *mutatis mutandis* in respect of offences under this Ordinance ;

(2) Whoever is guilty of the abetment of an offence liable to Hadd under this Ordinance shall be liable to the punishment provided for such offence as 'tazir'.

24. Application of Code of Criminal Procedure, 1898 (Act V of 1898) : (1) The provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), shall apply, *mutatis mutandis* in respect of cases under this Ordinance :

Provided that, if it appears in evidence that the offender has committed a different offence under any other law, he may, if the Court is competent to try that offence and to award punishment therefor, be convicted and punished for that offence :

¹[Provided further that an offence punishable under Section 9 or Section 17 shall be triable by a Court of Session and not by a Magistrate authorised under Section 30 of the said Code and an appeal from an order under either of the said sections ²[or from an order under any other provisions of this ordinance which imposes a sentence of imprisonment for a term exceeding two years], shall lie to the Federal Shariat Court :

Provided further that a trial by a Court of Session under this Ordinance shall ordinarily be held at the headquarters of the Tehsil in which the offence is alleged to have been committed].

(2) The provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), relating to the confirmation of the sentence of death, shall apply, *mutatis mutandis* to confirmation of sentences under this Ordinance.

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1. Provisos added by the Offences Against Property (Enforcement of Hudood) (Amendment) Ordinance, XIX of 1980, S. 3.
 2. Words inst. by the Offences Against Property (Enforcement of Hudood) (Amendment) Ordinance, II of 1982, S. 2.

(3) The provisions of sub-section (3) of Section 391 or Section 393 of the Code of Criminal Procedure, 1898 (Act V of 1898), shall not apply in respect of the punishment of whipping awarded under this Ordinance.

(4) The provisions of Chapter XXIX of the Code of Criminal Procedure, 1898 (Act V of 1898), shall not apply in respect of punishments awarded under Section 9 or Section 17 of this Ordinance.

25. Presiding officer of Court to be a Muslim :
The Presiding Officer of the Court by which a case is tried, or an appeal is heard, under this Ordinance shall be a Muslim :

Provided that, if the accused is a non-Muslim, the Presiding Officer may be a non-Muslim.

26. Saving : Nothing in this Ordinance shall be deemed to apply to cases pending before any Court immediately before the commencement of this Ordinance, or to offences committed before such commencement.

The Offence of Zina (Enforcement of Hudood) Ordinance

¹(VII OF 1979)

[10th February, 1979]

**An Ordinance to bring in conformity with
the injunctions of Islam the law relating
to the offence of 'Zina'**

Preamble : Whereas it is necessary to modify the existing law relating to Zina so as to bring it in conformity with the injunctions of Islam as set out in the Holy Qur'an and Sunnah ;

And whereas the President is satisfied that circumstances exist which render it necessary to take immediate action ;

Now, therefore, in pursuance of the Proclamation of the Fifth day of July, 1979, read with the Laws (Continuance in Force) Order, 1977 (C. M. L. A. Order No. 1 of 1977), and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance :—

1. Short title, extent and commencement : (1)
This Ordinance may be called the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

(2) It extends to the whole of Pakistan.

(3) It shall come into force on the twelfth day of Rabi-ul-Awwal, 1399 Hijri, that is, the tenth day of February, 1979.

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1. This Ordinance has been applied to the Provincially Administered Tribal Areas of Baluchistan *vide* Baluchistan Government Noti. No. S. O. (TA)-3 (46)/79, dated 29th April, 1979.

This Ordinance has been applied to the Federally Administered Tribal Areas, *vide* S.R.O. No. 362 (1)/79, dated 23th April, 1979.

2. Definitions : In this Ordinance, unless there is anything repugnant in the subject or context,—

- (a) "**adult**" means a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty.
- (b) "**hadd**" means punishment ordained by the Holy Qur'an or Sunnah.
- (c) "**marriage**" means marriage which is not void according to the personal law of the parties, and "**married**" shall be construed accordingly.
- (d) "**muhsan**" means—
 - (i) A Muslim adult man who is not insane and has had sexual intercourse with a Muslim adult who, at the time he had sexual intercourse with her, was married to him and was not insane ; or
 - (ii) a Muslim adult woman who is not insane and has had sexual intercourse with a Muslim adult man, who at the time she had sexual intercourse with him, was married to her and was not insane ; and
- (e) "**tazir**" means any punishment other than **hadd**, and all other terms and expressions not defined in this Ordinance shall have the same meaning as in the Pakistan Penal Code (Act XLV of 1860), or the Code of Criminal Procedure, 1898 (Act V of 1898).

3. Ordinance to override other laws : The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.

4. Zina : A man and a woman are said to commit '**Zina**' if they wilfully have sexual intercourse without being validly married to each other.

Explanation : Penetration is sufficient to constitute the sexual intercourse necessary to the offence of **Zina**.

5. Zina liable to hadd : (1) Zina is **zina** liable to **hadd** if—

- (a) it is committed by a man who is an adult and is not insane with a woman to whom he is not, and does not suspect himself to be married ; or

(b) it is committed by a woman who is an adult and is not insane with a man to whom she is not, and does not suspect herself to be, married.

(2) Whoever is guilty of *zina* liable to *hadd* shall, subject to the provisions of this Ordinance,—

(a) if he or she is a *muhsan*, be stoned to death at a public place ; or

(b) if he or she is not a *muhsan*, be punished, at a public place, with whipping numbering one hundred stripes.

(3) No punishment under sub-section (2) shall be executed until it has been confirmed by the Court to which an appeal from the order of conviction lies ; and if the punishment be of whipping, until it is confirmed and executed, the convict shall be dealt with in the same manner as if sentenced to simple imprisonment.

6. Zina-bil-jabr : (1) A person is said to commit *zina-bil-jabr* if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely :

(a) against the will of the victim ;

(b) without the consent of the victim ;

(c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt ; or

(d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married.

Explanation : Penetration is sufficient to constitute the sexual intercourse necessary to the offence of *zina-bil-jabr*.

(2) *Zina-bil-jabr* is *zina-bil-jabr* liable to *hadd* if it is committed in the circumstances specified in sub-section (1) of Section 5.

(3) Whoever is guilty of *zina-bil-jabr* liable to *hadd* shall subject to the provisions of this Ordinance,—

- (a) if he or she is not *muhsan*, be stoned to death at a public place ; or
- (b) if he or she is not *muhsan*, be punished with whipping numbering one hundred stripes, at a public place, and with such other punishment, including the sentence of death, as the Court may deem fit having regard to the circumstances of the case.

(4) No punishment under sub-section (3) shall be executed until it has been confirmed by the Court to which an appeal from the order of conviction lies ; and if the punishment be of whipping, until it is confirmed and executed, the convict shall be dealt with in the same manner as if sentenced to simple imprisonment.

7. Punishment for zina or zina-bil-jabr where convict is not an adult : A person guilty of *zina* or *zina-bil-jabr* shall, if he is not an adult, be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both, and may also be awarded the punishment of whipping not exceeding thirty stripes :

Provided that, in the case of *zina-bil-jabr*, if the offender is not under the age of fifteen years, the punishment of whipping shall be awarded with or without any other punishment.

8. Proof of zina or zina-bil-jabr liable to hadd : Proof of *zina* or *zina-bil-jabr* liable to *hadd* shall be in one of the following forms, namely :—

- (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence ; or
- (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of *tazkiyah-al-shuhood*, that they are truthful persons and abstain from major sins (*khabir*), give evidence as eye-witnesses of the act of penetration necessary to the offence :

Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslims.

Explanation : In this section "*tazkiyah-al-shuhood*" means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.

9. Cases in which Hadd shall not be enforced :

(1) In a case in which the offence of *zina* or *zina-bil-jabr* is proved only by the confession of the convict, *hadd*, or such of it as is yet to be enforced, shall not be enforced if the convict retracts his confession before the *hadd* or such part is enforced.

(2) In a case in which the offence of *zina* or *zina-bil-jabr* is proved only by testimony, *hadd*, or such part of it as is yet to be enforced, shall not be enforced if any witness resiles from his testimony before *hadd* or such part is enforced, so as to reduce the number of eye-witnesses to less than four.

(3) In the case mentioned in sub-section (1), the Court may order retrial.

(4) In the case mentioned in sub-section (2), the Court may award *tazir* on the basis of the evidence on record.

10. Zina or zina-bil-jabr : (1) Subject to the provisions of Section 7, whoever commits *zina* or *zina-bil-jabr* which is not liable to *hadd*, or for which proof in either of the forms mentioned in Section 8 is not available and the punishment of '*qazf*' liable to *hadd* has not been awarded to the complainant, or for which *hadd* may not be enforced under this Ordinance, shall be liable to *tazir*.

(2) Whoever commits *zina* liable to *tazir* shall be punished with rigorous imprisonment for a term which **[shall not be less than four years nor more than] ten years* and with whipping numbering thirty stripes, and shall also be liable to fine.

¹[(3) Subject to sub-section 4] whoever commits *zina-bil-jabr* liable to *tazir* shall be punished with imprisonment for a term which shall not be less than four years not more than twenty-five years and, if the punishment be one of imprisonment, shall also be awarded the punishment of whipping numbering thirty stripes.

²[(4) When *zina-bil-jabr* liable to *tazir* is committed by two or more persons in furtherance of common intention of all each of such person shall be punished with death].

11. Kidnapping, abducting or inducing women to compel for marriage, etc. : Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be com-

1. Words subs. by Offence of Zina (Amendment) Act, VI of 1997.

2. Sub--sec. (4) added by Offence of Zina (Amendment) Act, VI of 1997.

pelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in the Pakistan Penal Code (Act XLV of 1860) or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, or seduced to illicit intercourse with another shall also be punishable as aforesaid.

12. Kidnapping or abducting in order to subject person to unnatural lust: Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with death or rigorous imprisonment for a term which may extend to twenty-five years, and shall also be liable to fine, and, if the punishment be one of imprisonment, shall also be awarded the punishment of whipping not exceeding thirty stripes.

13. Selling person for purposes of prostitution, etc.: Whoever sells, lets to hire, or otherwise disposes of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes, and shall also be liable to fine.

Explanations: (a) When a female is sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the person so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution.

(b) For the purposes of this section and Section 14, "illicit intercourse" means sexual intercourse between persons not united by marriage.

14. Buying person for purposes of prostitution, etc. : Whoever buys, hires or otherwise obtains possession of any person with intent that such person shall at any time be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any time be employed or used for any such purpose, shall be punished with imprisonment for life and with whipping not exceeding thirty stripes and shall also be liable to fine.

Explanation : Any prostitute or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

15. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage : Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief, shall be punished with rigorous imprisonment for a term which may extend to twenty-five years and with whipping not exceeding thirty stripes and shall also be liable to fine.

16. Enticing or taking away or detaining with criminal intent a woman : Whoever takes or entices away any woman with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any woman, shall be punished with imprisonment of either description for a term which may extend to seven years and with whipping not exceeding thirty stripes, and shall also be liable to fine.

17. Mode of execution of punishment of stoning to death : The punishment of stoning to death awarded under Section 5 or Section 6 shall be executed in the following manner ; namely :—

Such of the witnesses who deposed against the convict as may be available shall start stoning him and, while stoning is being carried on, he may be shot dead, whereupon stoning and shooting shall be stopped.

18. Punishment for attempting to commit an offence : Whoever attempts to commit an offence punishable under this Ordinance with imprisonment or

of the offence, shall be punished with imprisonment for a term which may extend to one-half or the longest term provided for that offence, or with whipping not exceeding thirty stripes, or with such fine as is provided for the offence, or with any two of, or all, the punishments.

19. Application of certain Provisions of Pakistan Penal Code (Act XLV of 1860) and Amendment : (1) Unless otherwise expressly provided in this Ordinance, the provisions of Sections 34 to 38 of Chapter II, Sections 63 to 72 of Chapter III and Chapters V and V-A of the Pakistan Penal Code (Act XLV of 1860), shall apply, *mutatis mutandis*, in respect of offences under this Ordinance.

(2) Whoever is guilty of the abetment of an offence liable to 'hadd' under this Ordinance shall be liable to the punishment provided for such offence as 'tazir'.

(3) In the Pakistan Penal Code (Act XLV of 1860) :

(a) Sec. 366, Section 372, Section 373, Section 375 and Section 376 of Chapter XVI and Section 493, Section 497 and Section 498 of Chapter XX shall stand repealed ; and

(b) in Section 367, the words and comma "or to the unnatural lust of any person" shall be omitted.

20. Application of Code of Criminal Procedure, 1898, and amendment : (1) The provisions of the Code of Criminal Procedure, 1898 (Act V of 1898) hereafter in this section referred to as the Code, shall apply, *mutatis mutandis*, in respect of cases under this Ordinance :

Provided that, if it appears in evidence that the offender has committed a different offence under any other law, he may, if the Court is competent to try that offence and award punishment therefor, be convicted and punished for that offence :

[Provided further that an offence punishable under this Ordinance shall be triable by a Court of Session and not by a Magistrate authorised under Section 30 of the said Code and an appeal from an order of the Court of Session shall lie to the Federal Shariat Court :

1. Provisos added by the Ordinance of Zina (Enforcement of Hudood (Amendment) Ordinance, XX of 1980, S. 2.

whipping, or to cause such an offence to be committed, and in such attempt does any act towards the commission

Provided further that a trial by a Court of Session under this Ordinance shall ordinarily be held at the headquarters of the Tehsil in which the offence is alleged to have been committed].

(2) The provisions of the Code relating to the confirmation of the sentence of death shall apply, *mutatis mutandis*, to confirmation of sentences under this Ordinance.

(3) The provisions of Section 198, Section 199, Section 199-A or Section 199-B of the Code shall not apply to the cognizance of an offence punishable under Sec. 15 or Section 16 of this Ordinance.

(4) The provisions of sub-section (3) of Section 391 or Section 393 of the Code shall not apply in respect of the punishment of whipping awarded under this Ordinance.

(5) The provisions of Chapter XXIX of the Code shall not apply in respect of punishments awarded under Sec. 5 or Section 6 of this Ordinance.

(6) In the Code, Section 561 shall stand repealed.

21. Presiding Officer of Court to be Muslim : The Presiding Officer of the Court by which a case is tried, or an appeal is heard, under this Ordinance, shall be a Muslim :

Provided that, if the accused is a non-Muslim, the Presiding Officer may be a non-Muslim.

22. Saving : Nothing in this Ordinance shall be deemed to apply to the cases pending before any Court immediately before the commencement of this Ordinance, or to offences committed before such commencement.

**The
Offence of Qazf
(Enforcement of Hadd)
Ordinance
(VIII OF 1979)**

[10th February, 1979]

**An Ordinance to bring in conformity with the
injunctions of Islam the law relating to
the offence of 'qazf'**

Preamble : Whereas it is necessary to modify the existing law relating to 'qazf' so as to bring it in conformity with the injunctions of Islam as set out in the Holy Qur'an and Sunnah ;

And whereas the President is satisfied that circumstances exist which render it necessary to take immediate action ;

Now, therefore, in pursuance of the proclamation of the Fifth day of July, 1977, read with the Laws (Continuance in Force) Order, 1977 (C. M. L. A. Order No. 1 of 1977), and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance :

1. Short title, extent and commencement : (1) This Ordinance may be called the Offence of 'Qazf' (Enforcement of Hadd) Ordinance, 1979.

(2) It extends to the whole of Pakistan.

(3) It shall come into force on the twelfth day of Rabi-ul-Awwal, 1399 Hijri, that is, the tenth day of February, 1979.

2. Definition : In the Ordinance, unless there is anything repugnant in the subject or context—

(a) "adult", "hadd", "tazir", "zina" and "zina-bil-jabr" have the same meaning as in the Offence

of Zina (Enforcement of Hudood) Ordinance, 1979 ; and

- (b) all other terms and expressions not defined in this Ordinance shall have the same meaning as in the Pakistan Penal Code (Act XLV of 1860), or the Code of Criminal Procedure, 1898 (Act V of 1898).

3. Qazf : Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes an imputation of 'zina' concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation, or hurt the feelings, of such person, is said, except in the cases hereinafter excepted, to commit 'qazf'.

Explanation 1 : It may amount to 'qazf' to impute 'zina' to a deceased person, if the imputation would harm the reputation, or hurt the feelings, of that person if living, and is harmful to the feelings of his family or other near relatives.

Explanation 2 : An imputation in the form of an alternative or expressed ironically, may amount to 'qazf'.

First exception (imputation of truth which public good requires to be made or published) : It is not 'qazf' to impute 'zina' to any person if the imputation be true and made or published for the public good. Whether or not it is for the public good is a question of fact.

Second exception (accusation preferred in good faith to authorised person) : Save in the cases hereinafter mentioned, it is not 'qazf' to prefer in good faith an accusation of 'zina' against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation :—

- (a) a complainant makes an accusation of 'zina' against another person in a Court, but fails to produce four witnesses in support thereof before the Court ;
- (b) according to the finding of the Court, a witness has given false evidence of the commission of 'zina' or 'zina-bil-jabr' ;
- (c) according to the finding of the Court, a complainant has made a false accusation of 'zina-bil-jabr'.

4. Two kinds of qazf : 'Qazf' may be either 'qazf' liable to 'hadd' or 'qazf' liable to 'tazir'.

5. Qazf liable to 'hadd' : Whoever, being an adult, intentionally and without ambiguity commits 'qazf' of 'zina', liable to 'hadd' against a particular person who is a 'muhsan' and capable of performing sexual intercourse is, subject to the provisions of this Ordinance, said to commit 'qazf' liable to 'hadd'.

Explanation 1 : In this section, "muhsan" means a sane and adult Muslim who either has had no sexual intercourse or has had such intercourse only with his or her lawfully wedded spouse.

Explanation 2 : If a person makes in respect of another person the imputation that such other person is an illegitimate child, or refuses to recognise such person to be a legitimate child, he shall be deemed to have committed 'qazf' liable to 'hadd' in respect of the mother of that person.

6. Proof of qazf liable to hadd : Proof of 'qazf' liable to 'hadd' shall be in one of the following forms, namely :—

- (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence ;
- (b) the accused commits 'qazf' in the presence of the Court ; and
- (c) at least two Muslim adult male witnesses, other than the victim of the 'qazf', about whom the Court is satisfied, having regard to the requirements of 'tazkiyah al-shahud', that they are truthful persons and abstain from major sins (kabair), give direct evidence of the commission of 'qazf' :

Provided that, if the accused is a non-Muslim, the witnesses may be non-Muslims :

Provided further that the statement of the complainant or the person authorised by him shall be recorded before the statements of the witnesses are recorded.

7. Punishment of 'qazf' liable to 'hadd': (1) Whoever commits 'qazf' liable to 'hadd' shall be punished with whipping numbering eighty stripes.

(2) After a person has been convicted for the offence of 'qazf' liable to 'hadd', his evidence shall not be admissible in any Court of Law.

(3) A punishment awarded under sub-section (1) shall not be executed until it has been confirmed by the Court to which an appeal from the Court awarding the punishment lies; and until the punishment is confirmed and executed, the convict shall, subject to the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898) relating to the grant of bail or suspension of sentence, be dealt with in the same manner as if sentenced to simple imprisonment.

8. Who can file a complaint: No proceedings under this Ordinance shall be initiated except on a report made to the police or a complaint lodged in a Court by the following, namely:—

- (a) if the person in respect of whom the 'qazf' has been committed be alive, that person, or any person authorised by him; or
- (b) if the person in respect of whom the 'qazf' has been committed be dead, any of the ascendants or descendants of that person.

9. Cases in which 'hadd' shall not be imposed or enforced: (1) 'Hadd' shall not be imposed for 'qazf' in any of the following cases, namely:—

- (a) when a person has committed 'qazf' against any of his descendants;
- (b) when the person in respect of whom 'qazf' has been committed and who is a complainant has died during the pendency of the proceedings; and
- (c) when the imputation has been proved to be true.

(2) In a case in which, before the execution of 'hadd' the complainant withdraws his allegation of 'qazf', or states that the accused had made a false confession or

that any of the witnesses had deposed falsely and the number of witnesses is thereby reduced to less than two, 'hadd' shall not be enforced, but the Court may order retrial or award 'tazir' on the basis of the evidence on record.

10. Qazf liable to Tazir : Whoever commits 'qazf' which is not liable to 'hadd' or for which proof in any of the forms mentioned in Section 6 is not available, or for which 'hadd' may not be imposed or enforced under Section 9, is said to commit 'qazf' liable to 'tazir'.

11. Punishment for 'Qazf' liable to 'Tazir' : Whoever commits 'qazf' liable to 'tazir' shall be punished with imprisonment of either description for a term which may extend to two years and with whipping not exceeding forty stripes, and shall also be liable to fine.

12. Printing or engraving matter known to be of the nature referred to in Section 3 : Whoever prints or engraves any matter knowing or having good reason to believe that such matter is of the nature referred to in Section 3, shall be punished with imprisonment of either description for a term which may extend to two years, or with whipping not exceeding thirty stripes, or with fine, or with any two of, or all, the punishments.

13. Sale of printed or engraved substance containing matter of the nature referred to in Section 3 : Whoever sells or offers for sale any printed or engraved substance containing matter of the nature referred to in Section 3, knowing that it contains such matter, shall be punished with imprisonment of either description for a term which may extend to two years, or with whipping not exceeding thirty stripes, or with fine or with any two of, or all, the punishments.

14. Lian : (1) When a husband accuses before a Court his wife who is 'muhsan' within the meaning of Section 5, of 'zina' and the wife does not accept the accusation as true, the following procedure of 'lian' shall apply, namely :—

- (a) the husband shall say upon oath before the Court :
"I swear by Allah the Almighty and say I am surely truthful in my accusation of 'zina' against

my wife (name of wife)" and, after he has said so four times, he shall say : "Allah's curse be upon me if I am 'liar' in my accusation of 'zina' against my wife (name of wife)" ; and

- (b) the wife shall, in reply to the husband's statement made in accordance with clause (a) say upon oath before the Courts : "I swear by Allah the Almighty that my husband is surely a 'liar' in his accusation of 'zina' against me", and, after she has said so four times, she shall say : "Allah's wrath be upon me if he is truthful in his accusation of 'zina' against me".

(2) When the procedure specified in sub-section (1) has been completed, the Court shall pass an order dissolving the marriage between the husband and wife, which shall operate as a decree for dissolution of marriage and no appeal shall lie against it.

(3) Where the husband or the wife refuses to go through the procedure specified in sub-section (1), he or, as the case may be, she shall be imprisoned until :

- (a) in the case of the husband, he has agreed to go through the aforesaid procedure ; or
- (b) in the case of the wife, she has either agreed to go through the aforesaid procedure or accepted the husband's accusation as true.

(4) A wife who has accepted the husband's accusation as true shall be awarded the punishment for the offence of 'zina' liable to 'hadd' under the imposition of Hudood for the Offence of 'Zina' Ordinance, 1979.

15. Punishment for attempt to commit offence punishable under this Ordinance : Whoever attempts to commit an offence punishable under this Ordinance, or to cause such an attempt to be committed, and in such attempt does any act towards the commission of the offence, shall be punished with imprisonment for a term which may extend to one-half of the longest term provided for the offence, or with such whipping or fine as is provided for the offence, or with any two of, or all, the punishments.

16. Application of certain provisions of Pakistan Penal Code (Act XLV of 1860) : (1) Unless otherwise expressly provided in this Ordinance, the provisions of Sections 34 to 38 of Chapter II, Sections 63 to 72 of Chapter III and Chapters V and V-A of the Pakistan Penal Code (Act XLV of 1860), shall apply *mutatis mutandis*, in respect of offences under this Ordinance.

(2) Whoever is guilty of the abetment of an offence liable to 'hadd' under this Ordinance shall be liable to the punishment provided for such offence as 'tazir'.

17. Application of the Code of Criminal Procedure, 1898 (Act V of 1898) : (1) Unless otherwise expressly provided in this Ordinance, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), hereinafter referred to as the said Code, shall apply, *mutatis mutandis*, in respect of cases under this Ordinance :

Provided that if it appears in evidence that the offender has committed a different offence under any other law, he may, if the Court is competent to try that offence and award punishment therefor, be convicted and punished for that offence :

¹[Provided further that an offence punishable under Section 7 of sub-section (4) of Section 14, shall be triable by, and proceedings under sub-section (1) and (2) of the latter section shall be held before a Court of Session and not by or before a Magistrate authorised under Section 30 of the said Code and an appeal from an order of the Court of Session shall lie to the Federal Shariat Court :

Provided further that a trial by, or proceeding before, the Court of Session under this Ordinance shall ordinarily, be held at the headquarters of the Tehsil in which the offence is alleged to have been committed or, as the case may be, the husband who has made the accusation ordinarily resides.]

(2) The provisions of the said Code relating to the confirmation of the sentence of death shall apply *mutatis mutandis* of the confirmation of a sentence under this Ordinance.

1. Provisos added by the Offence of Qazf (Enforcement of Hadd) (Amendment) Ordinance, XXI of 1980, S. 2.

(3) The provisions of sub-section (3) of Section 391 or Section 393 of the said Code shall not apply in respect of the punishment of whipping awarded under this Ordinance.

(4) The provisions of Chapter XXIX of the said Code shall not apply in respect of a punishment awarded under Section 7 of this Ordinance.

18. Presiding Officer of Court to be a Muslim : The Presiding Officer of the Court by which a case is tried, or an appeal is heard, under this Ordinance, shall be a Muslim.

19. Ordinance to override other Laws : The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.

20. Saving : Nothing in this Ordinance shall be deemed to apply to cases pending before any Court immediately before the commencement of this Ordinance, or to offences committed before such commencement.

The Prohibition (Enforcement of Hadd) Order

(4 OF 1979)

[10th February, 1979]

Preamble : Whereas it is necessary to modify the existing law relating to prohibition of intoxicants so as to bring it in conformity with the injunctions of Islam as set out in the Holy Qur'an and *Sunnah* :

Now, therefore, in pursuance of the Proclamation of the Fifth day of July, 1977 read with the Laws (Continuance in Force) Order, 1977 (C. M. L. A Order No. 1 of 1977), and in exercise of all powers enabling him in that behalf, the President and Chief Martial Law Administrator is pleased to make the following Order :

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement : (1) This Order may be called the Prohibition (Enforcement of Hadd) Order, 1979.

(2) It extends to the whole of Pakistan.

(3) It shall come into force on the twelfth day of Rabi-ul-Awwal, 1399 Hijri, that is, the 10th day of February, 1979.

2. Definitions : In this Order, unless there is anything repugnant in the subject or context—

(a) "adult" means a person who has attained the age of eighteen years of puberty ;

(b) "authorised medical officer" means a medical officer, howsoever designated, authorised by the Provincial Government ;

(c) "bottle" or "bottling" means to transfer intoxicating liquor from a cask or other vessel to a bottle,

jar, flask, pot or similar receptacle for the purpose of sale, whether any process of manufacture be employed or not, and includes rebottling ;

- (d) "buy" or "buying" includes any receipt by way of gift or otherwise ;
- (e) "Collector" means any person appointed under this Order to exercise or perform all or any of the powers or functions of a Collector under this Order ;
- (f) 'hadd' means punishment ordained by the Holy Qur'an or Sunnah ;
- (g) "intoxicant" means an article specified in the Schedule and include intoxicating liquor and other article or any substance which the Provincial Government may by notification in the official Gazette, declare to be an intoxicant for the purposes of this Order ;
- (h) "intoxicating liquor" includes toddy, spirits of wine, beer and all liquids consisting of or containing alcohol normally used for purposes of intoxication, but does not include a solid intoxicant even if liquefied ;
- (i) "manufacture" includes every process, whether natural or artificial, by which any intoxicant is produced, prepared or blended, and also redistillation and every process for the rectification of intoxicating liquors ;
- (j) "place" includes a house, shed, enclosure, building, shop, tent, vehicle, vessel and aircraft ;
- (k) "Prohibition Officer" means the Collector or any officer appointed or invested with powers under Article 21 ;
- (l) "public place" means a street, road, thoroughfare, park, garden or other place to which the public have free access and includes a hotel, restaurant, motel, mess and club, but does not include the residential room of a hotel in the occupation of some person ;
- (m) "rectification" includes every process whereby intoxicating liquors are purified, coloured or flavoured by mixing any material therewith ;

- (n) "sale" or "selling" includes any transfer by way of gift or otherwise ;
- (o) "ta'zir" means any punishment other than 'hadd' ; and
- (p) "transport" means to move from one place to another.

CHAPTER II

PROHIBITION AND PENALTIES

3. Prohibition of manufacture, etc., of intoxicants : ¹[(1) Subject to the provisions of Clause (2) whoever] :—

- (a) imports, exports, transports, manufactures or processes any intoxicant ; or
- (b) bottles any intoxicant ; or
- (c) sells or serves any intoxicant ; or
- (d) allows any of the acts aforesaid upon premises owned by him or his immediate possession ;

shall be punishable with imprisonment of either description for a term which may extend to five years and with whipping not exceeding thirty stripes, and shall also be liable to fine.

²[(2) Whoever—

- (i) imports, exports, transports, manufactures, or traffics in, opium or coca leaf or opium or coca derivatives ; or
- (ii) finances the import, export, transport, manufacture, or trafficking of, opium or coca leaf or opium or coca derivatives ;

shall be punishable with imprisonment for life or with imprisonment which is not less than two years and with whipping not exceeding three stripes, and shall also be liable to fine.]

4. Owning or possessing intoxicant : Whoever owns, possesses or keeps in his custody any intoxicant shall be punished with imprisonment of either description

1. Arti. 3 renumbered as Clause (1) by the Prohibition (Enforcement of Hadd) (Amendment) President Order, 12 of 1983, S. 2(a).

2. Clause (2) added *ib/d.* S. 2(b).

for a term which may extend to two years, or with whipping not exceeding thirty stripes, and shall also be liable to fine ;

Provided that nothing contained in this Article shall apply to a non-Muslim foreigner or to a non-Muslim citizen of Pakistan who keeps in his custody at or about the time of ceremony prescribed by his religion a reasonable quantity of intoxicating liquor for the purpose of using it as a part of such ceremony :

¹[Provided further that, if the intoxicant in respect of which the offence is committed is herein, cocaine, raw opium or coca leaf, and the quantity exceeds ten grams in the case of heroin or cocaine or one kilogram in the case of raw opium or coca leaf, the offender shall be punishable with imprisonment for life or with imprisonment which is not less than two years and with whipping not exceeding thirty stripes, and shall also be liable to fine.]

5. Article 3 or Article 4 not to apply to certain acts : Nothing contained in Article 3 or Article 4 shall apply to any act done under, and in accordance with the provisions of this Order, or the terms of any rule, notification, order or licence issued thereunder.

6. Drinking : Whoever, intentionally and without 'ikrah' or 'iztirar' takes an intoxicant by any means whatsoever, whether such taking causes intoxication or not, shall be guilty of drinking.

Explanation : In this Article :—

- (a) 'ikrah' means putting any person in fear of injury to the person, property or honour of that or any other person ; and
- (b) 'iztirar' means a situation in which a person is in apprehension of death due to extreme hunger or thirst or serious illness.

7. Two kinds of drinking : Drinking may be either drinking liable to 'Hadd' or drinking liable to 'Tazir'.

8. Drinking liable to 'Hadd' : Whoever being an adult Muslim takes intoxicating liquor by mouth is guilty of drinking liable to 'hadd' and shall be punished with whipping numbering eighty stripes :

1. Proviso added by the Prohibition (Enforcement of Hadd) (Amendment) President Order, 12 of 1983, S. 3.

Provided that the punishment shall not be executed unless it is confirmed by the Court to which an appeal from the order of conviction lies : and until the punishment is confirmed and executed, the convict shall be subject to the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), relating to the grant of bail or suspension of sentence, be dealt with in the same manner as if sentence to simple imprisonment.

9. Proof of drinking liable to Hadd : The proof of drinking liable to 'hadd' shall be in one of the following forms, namely :—

- (a) the accused makes before a Court of competent jurisdiction a confession of the commission of drinking liable to 'hadd' ; and
- (b) at least two Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirement of 'tazkiyah-al-shuhood', that they are truthful persons and abstain from major sins (kabair) give evidence of the accused having committed the offence of drinking liable to hadd'.

In this Article, 'Tazkiyah-al-shuhood' means the mode of inquiry adopted by a Court to satisfy itself as to the credibility of a witness.

10. Cases in which Hadd shall not be enforced :

(1) 'Hadd' shall not be enforced in the following cases, namely :—

- (a) when drinking is proved only by the confession of the convict but he retracts his confession before the execution of 'hadd' ; and
- (b) when drinking is proved by testimony, but before the execution of 'hadd', any witness resiles from his testimony so as to reduce the number of witnesses to less than two.

(2) In a case mentioned in (1), the Court may order retrial in accordance with the Code of Criminal Procedure, 1898 (Act V of 1898).

11. Drinking liable to Tazir : Whoever—

- (a) being a Muslim, is guilty of drinking which is not liable to 'hadd' under Article 8 or for which proof in either of the forms mentioned in Article 9 is not available and the Court is satisfied that the

offence stands proved by the evidence on the record ;

(b) being a non-Muslim citizen of Pakistan, is guilty of drinking except as a part of a ceremony prescribed by his religion ; or

(c) being a non-Muslim who is not a citizen of Pakistan, is guilty of drinking at public place ;

shall be liable to tazir and shall be punished with imprisonment of either description for a term which may extend to three years or with whipping not exceeding thirty stripes, or with both.

12. Arrest on suspension of violation of Article 8 or Article 11 : (1) No police officer shall detain or arrest any person on suspicion that he has taken an intoxicant in violation of Articles 8 or 11 unless he has asked such person to accompany him to an authorised medical officer for examination and such person either refuses to so accompany him or having been examined by the medical practitioner is certified by him to have taken an intoxicant.

(2) Whoever contravenes the provisions of clause (1) shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both.

13. Punishment for vexatious delay : Any officer or person exercising powers under this Order who vexatiously and unnecessarily delays forwarding to a Prohibition Officer any person arrested or any article seized under this Order shall be punishable with fine which may extend to one thousand rupees.

14. Things liable to confiscation : In any case in which an offence has been committed under this Order, the intoxicant, still, ostensil, implement or apparatus in respect or by means of which the offence has been committed shall be liable to confiscation along with the receptacles, packages, coverings, animals, vessels, carts or other vehicles used to hold or carry the same.

15. Confiscation how ordered : (1) In any case involving anything liable to confiscation under this Order, the Court deciding the case may order such confiscation despite the acquittal of the person charged.

(2) When an offence under this Order has been committed but the offender is not known or cannot be found, or when anything liable to confiscation under this Order and not in the possession of any person cannot be satisfactorily accounted for the case shall be inquired into and determined by the Collector or other Prohibition Officer-in-charge of the District or any other officer authorised by the Provincial Government in this behalf, who may order such confiscation :

Provided that no such order shall be made until the expiration of fifteen days from the date of seizure of the things intended to be confiscated or without hearing the persons, if any, claiming any right thereto and evidence, if any, which they produce in support of their claims.

16. Cognizance of certain offences : (1) The following offences shall be cognizable, namely :

- (a) an offence punishable under Article 3 ; and
- (b) an offence punishable under Article 4, Article 8 or Article 11, if committed at a public place.

(2) No Court shall take cognizance of an offence punishable under :

- (a) Article 12 or Article 13, save on a complaint made by the person in respect of whom the offence has been committed ; and
- (b) Article 20, save on a complaint made by, or under the authority of, a Prohibition Officer.

CHAPTER III

LICENCES FOR MEDICINAL OR SIMILAR OTHER PURPOSES

17. Licenses for 'Bona Fide' medicinal or other purposes : The Provincial Government or, subject to the control of the Provincial Government, the Collector, may issue licences to any person in respect of any institution, whether under the management of Government or not :—

- (a) for the manufacture, import, transport, sale or possession of any intoxicant or article containing intoxicating liquor on the ground that such intoxicant or article is required by such person in respect of such institution for a *bona fide* medicinal, scientific, industrial or similar other purpose or for consumption by a non-Muslim

- citizen of Pakistan as a part of a religious ceremony or by a non-Muslim foreigner ; or
- (b) for the export of any intoxicant or article containing intoxicating liquor.

18. Forms and conditions of licences : Every licence issued under this Order shall :—

- (a) be granted on payment of such fee, if any, for such period and on such condition ; and
- (b) be in such form and contain such particulars, as the Provincial Government may direct, either generally or in any particular case.

19. Power to cancel or suspend licences : (1) The Collector may cancel or suspend a licence :

- (a) if any fee payable by the holder thereof be not duly paid, or
- (b) in the event of any breach by the holder thereof or by his servant or by any one acting with his express or implied permission on his behalf of any of the terms or conditions of the licence.

(2) The Collector shall cancel a licence if—

- (a) the holder thereof is convicted of any offence under this Order ; or
- (b) the purpose for which licence is granted ceases to exist.

(3) As and when any licence is cancelled under clause (1) or clause (2), the holder thereof shall at once declare to the Collector the stock of intoxicating liquor or articles containing such liquor lying with him, and dispose of such stock to such authorised person as the Collector may specify.

20. Penalty for the breach of conditions of licence : In the event of any breach by the holder of a licence or by his servant or by any one acting with his express or implied permission on his behalf, of any of the terms and conditions of the licence, such holder shall, in addition to the cancellation or suspension of the licence, and in addition to any other punishment to which he may be liable under this Order, be punishable with imprisonment ¹[for life or with imprisonment which is not

1. Words subs. for the words 'of either description for a term which may extend to one year' by the Prohibition (Enforcement of Hadd) (Amendment) President Order, 12 of 1983, S. 4.

less than two years] and with fine, unless he proves that he exercised all due diligence to prevent such breach ; and any person who commits any such breach shall, whether he acts with or without the permission of the holder of the licence, also be liable to the same punishment.

CHAPTER IV ESTABLISHMENT AND CONTROL

21. Appointment of officers : The Provincial Government may, from time to time, by notification in the official Gazette :

- (a) appoint an officer to exercise all the powers of Collector under this Order in any area specified in the notification and to have the control of the administration of the provisions of this Order in such area ;
- (b) appoint officers with such designations, powers and duties as the Provincial Government may think fit to assist the Collector or other Prohibition Officer ; and
- (c) delegate to any Prohibition Officer all or any of its powers under this Order.

CHAPTER V POWERS, DUTIES AND PROCEDURE OF OFFICERS, ETC.

22. Issue of search warrants : (1) If any Collector, Prohibition Officer or Magistrate, upon information obtained and after such inquiry as he thinks necessary, has reason to believe that an offence under Article 3, Article 4, Article 8 or Article 11 has been committed, he may issue a warrant for the search for any intoxicant, material, still, utensil, implement or apparatus in respect of which the alleged offence has been committed.

(2) Any person has been entrusted with the execution of such a warrant may detain and search and, if he thinks proper, but subject to the provision of clause (1) of Article 12, arrest any person found in the place searched, if he has reason to believe such person to be guilty of an offence under Article 3, Article 4, Article 8 or Article 11.

23. Powers of Prohibition Officer : In addition to the powers conferred on him by the foregoing provisions of this Order, a Prohibition Officer shall have all the powers conferred on the officer-in-charge of a police station while conducting an investigation into a cognizable offence.

24. Enhanced punishment for certain offences after previous conviction : Whoever, having been convicted by a Court of an offence shall, in addition to the punishment provided for that offence, awarded for every such subsequent offence the punishment of imprisonment provided for that offence.

25. Punishment for attempt to commit offence punishable under this Order : Whoever attempts to commit an offence punishable under this Order or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall be punished, in the case of an offence punishable under Article 8, with rigorous imprisonment for a term which may extend to two years, and in other cases, with imprisonment for a term which may extend to one-half of the longest term provided for that offence, or with such whipping or fine as is provided for the offence or with any two of or all, the punishments.

26. Application of certain provisions of the Pakistan Penal Code (Act XLV of 1860) : (1) Unless otherwise expressly provided in this Order, the provisions of Sections 34 to 38 of Chapter II, Sections 63 to 72 of Chapter III, and Chapters V and V-A of the Pakistan Penal Code (Act XLV of 1860), shall apply, *mutatis mutandis*, in respect of offences under this Order.

(2) Whoever is guilty of the abetment of an offence liable to 'Hadd' under this Order shall be liable to the punishment provided for such offence as 'Tazir'.

27. Application of the Code of Criminal Procedure, 1898 (Act V of 1898) : Unless otherwise expressly provided in this Order, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), hereinafter referred to as the said Code, shall apply *mutatis mutandis* in respect of cases under this Order :

Provided that, if it appears in evidence that the offender has committed a different offence under any

other law, he may, if the Court is competent to try that offence and to award punishment therefore, be convicted and punished for that offence :

¹[Provided further that an offence punishable under Article 8 shall be triable by a Court of Session and not by a Magistrate authorised under Sec. 30 of the said Code and on appeal from an order under that Article ²[or from an order under any other provision of this Order which imposes a sentence of imprisonment for a term exceeding two years] shall lie to the Federal Shariat Court :

Provided further that a trial by a Court of Session under this Order shall ordinarily be held at the headquarters of the Tehsil in which the offence is alleged to have been committed].

(2) The provisions of the said Code relating to the confirmation of the sentence of death shall apply, *mutatis mutandis* to the confirmation of a sentence under this Order.

(3) The provisions of sub-section (3) of Section 391 or Section 393 of the said Code shall not apply in respect of the punishment of whipping awarded under this Order.

(4) The provisions of Chapter XXIX of the said Code shall not apply in respect of the punishment awarded under Article 8.

28. Indemnity : No suit, prosecution or other legal proceeding shall lie against a Provincial Government, a Police Officer, a Prohibition Officer or any other officer in respect of anything which is in good faith done under this Order or the rules made thereunder.

29. Order to override other Laws : This Order shall have effect notwithstanding anything contained in any other law for the time being in force.

30. Presiding officer of Court to be a Muslim : This Presiding Officer of the Court by which a case is tried or an appeal is heard, under this Order shall be a Muslim :

Provided that if the accused is a non-Muslim, the Presiding Officer may be a non-Muslim.

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1. Provisos added by the Prohibition (Enforcement of Hadd) Amendment) President Order, 5 of 1980, S. 2.
 2. Words inst. by the Prohibition (Enforcement of Hadd) (Amendment) President Order, 6 of 1982, S. 2.

31. Power to make Rules : (1) The Provincial Government may, by notification in the official Gazette, make rules for the purpose of carrying into effect the provisions of this Order.

(2) In particular and without prejudice to the generality of the foregoing provisions, the Provincial Government may make rules :—

- (a) for the issue of licences and the enforcement of the condition thereof ;
- (b) prescribing the powers to be exercised and the duties to be performed by Prohibition Officers in furtherance of the object of this Order ;
- (c) determining the local jurisdiction of Prohibition Officers in regard to inquiries and investigations ;
- (d) authorising any officer to exercise any power or perform any duty under this Order ;
- (e) regulating the delegation by the Collector or other Prohibition Officers of any powers conferred on them by or under this Order ;
- (f) declaring in what cases or classes of cases and to what authorities appeals shall lie from orders, whether original or appellate, passed by an authority other than a Court under this Order or under any rules made thereunder or by what authorities such order may be revised, and prescribing the time and manner of presenting appeals and procedure for dealing therewith ;
- (g) for the disposal of articles confiscated and of the proceeds thereof ; and
- (h) examination of persons referred to in Article 12.

32. Saving : Nothing in this Order shall be deemed to apply to cases pending before any Court immediately before the commencement of this Order or to offences committed before such commencement.

33. Repeal : The following laws are hereby repealed, namely :—

- (a) the Prohibition Act, 1977 (XXIV of 1977) ;
- (b) the Baluchistan Prohibition Ordinance, 1978 (Baluchistan Ordinance No. XI of 1978) ;

- (c) the North-West Frontier Province Prohibition Ordinance, 1978 (N.-W. F. P. Ordinance No. VI of 1978) ;
- (d) the Punjab Prohibition Ordinance, 1978 (Punjab Ordinance No. VI of 1978) ; and
- (e) the Sind Prohibition Ordinance, 1978 (Sind Ordinance No. IV of 1978).

THE SCHEDULE

1. The leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (*Cannabis Sativa L.*) including all forms known as *Bhang*, *Siddhi* or *Ganja*.
 2. Charas, that is, the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing or transport.
 3. Any mixture, with or without natural materials, of any of the articles mentioned in entries 1 and 2, or any drink prepared therefrom.
 4. Opium and opium derivatives as defined in the Dangerous Drugs Act, 1930 (II of 1930).
 5. Coca leaf and coca derivatives as defined in the aforesaid Act.
 6. Hashish.
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